

## Topic E: Digitalisation

A description and technical background for this topic is included below. The same text can also be found here. Questions on this topic are included after the text.

### Topic Description

78. As a key driver of innovation, digitalisation is closely linked to the competitiveness of industries in the EU<sup>74</sup> and has the potential to act as a powerful tool to close the productivity gap. Seizing the opportunities brought by digitalisation requires a level playing field enabling any company in the EU to innovate and grow without barriers.
79. The **Competitiveness Compass** stresses that *“in the global race to develop deep technologies and breakthrough innovations, competition policy must keep pace with evolving markets and tech innovation”*. The Competitiveness Compass also underlines that innovation and investment in certain strategic sectors should be given an adequate weight in merger assessments, in light of the European economy’s acute needs.
80. Markets shaped by digitalisation or other fast-moving markets go through transformational changes quickly and therefore, an extended forward-looking assessment may be required in order to properly capture the effects of a transaction. This is particularly the case when the merger involves the **acquisition of a nascent player** or where the transaction takes place on a **nascent market** with emerging novel and innovative technologies with the potential of disrupting the established industry. In fast-moving markets, **killer acquisitions of complements** need a careful assessment because in such markets a complementary product or player of today may very quickly become a substitute, an element that should be taken into account in the analysis.
81. Digitalisation has brought about several significant challenges that may hinder growth and innovation across different industries in the internal market. Markets shaped by digitalisation are often characterised by **“winner-takes-most” dynamics** that benefit the leading companies with a certain degree of market power. They are **prone to “tipping”** in favour of the firm’s technology that reaches critical mass adoption. Where dominant companies build **ecosystems** of interlinked products and services and where markets are prone to **network effects** making the value of the products and services depend on the number of buyers, sellers or users, existing competitors and new entrants face significant barriers to entry and expansion. As dominant players become more insulated against competition, smaller rivals and potential entrants find it difficult to reach the scale necessary to become attractive alternatives or even enter the market. These market characteristics are aggravated by **customer inertia**. Due to network effects, customers tend to stick with the incumbent because it is difficult to coordinate switching with other customers. With these market dynamics, the leading firm maintains and increases its customer base, and its market position becomes entrenched.
82. A common business strategy of leading companies in the digital and tech sectors has been to acquire complementary businesses or key inputs (e.g., data, technology, user traffic, but also talent, compute capacity and others) with the aim of strengthening their position in core

<sup>74</sup> As also stated in the report by Mario Draghi “The future of European competitiveness”, September 2024: *“a weak tech sector will hinder innovation performance in a wide range of adjacent fields, such as pharma, energy, materials and defence”* and the Competitiveness Compass (see headline ‘Excelling in the technologies for tomorrow’s economy’).

markets. Such a strategy may contribute to increases in innovation (e.g., development of new products or services, including in the area of artificial intelligence). However, such a strategy could also have negative effects. By developing or expanding an ecosystem of related products and services, the incumbent may **entrench** its position, thus making it harder for rivals to enter, expand, or innovate, as they are unable to replicate the breadth and scale of the predominant aggregated offering.

83. This type of business strategy does not easily fit into the traditional framework of analysis which distinguishes between horizontal and non-horizontal (vertical and conglomerate) mergers. This is largely because, in today’s digital economy, **fewer transactions are purely horizontal** (merging competing activities), vertical (merging activities at different levels of the value chain, e.g., one party offering an input for the other party), or conglomerate (merging activities otherwise related to one another) in nature, and the lines between horizontally or non-horizontally linked product markets become increasingly blurred. For instance, in mergers that involve companies with activities across several product markets, products often need to interoperate with each other or are offered as part of an ecosystem of related services.
84. Markets shaped by digitalisation carry a particular degree of **uncertainty** that raises questions about how forward looking the merger assessment should be, what kind of future changes it should take into account, and what kind of facts and evidence should be considered.<sup>75</sup> In markets characterised by network effects and “winner-takes-most” dynamics, it is essential not to intervene “too late” (thereby ensuring a level playing field amongst competitors, including potential new entrants), but also not “too soon”, potentially stifling innovation. This is particularly challenging in nascent and fast-moving markets, where historical market shares may tell little about effects to competition in the future.
85. Finally, certain digital mergers also raise **privacy and data protection concerns**. Competition and privacy concerns can arise when a merger leads to the acquisition of data or the combination of datasets.<sup>76</sup> In some markets, companies compete to gain customers based on their privacy settings, which can therefore be considered a non-price parameter of competition and the merger would eliminate such competition. This would be particularly problematic if the target explicitly markets itself as prioritising customer data protection, especially when the data involved is sensitive, as the merger could reduce consumer choice for privacy-focused services. Privacy concerns can also be taken into account when evaluating the credibility of (alternative) suppliers for specific customers. When suppliers have access to sensitive data, customers might not find it feasible to work with suppliers processing data in servers outside the internal market as this poses a risk of sensitive data being transferred outside the EU. The question is whether these privacy and data protection objectives enshrined in EU law play enough of a role in the market to be taken into account as a parameter of the Commission’s competitive assessment.

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<sup>75</sup> For example, in some cases, the Commission also assessed counterstrategies and potential retaliation by competitors and customers of the merged entity when assessing foreclosure concerns (for instance in M.9424 – *Nvidia/Mellanox*).

<sup>76</sup> To the extent the combination is possible in light of existing GDPR and DMA regulation.

## Technical background

86. The role of merger control is amongst others to ensure that markets remain competitive and accessible to start- and scale-ups that want to make use of the digital transformation of markets to bring innovation and increase productivity. To address specific challenges stemming from the digitalisation of the economy, the Commission has in recent years departed in some instances from the dichotomy horizontal/vertical to focus on the merger's effects in line with the legal test stipulated in Article 2 of the EU Merger Regulation.
87. The Commission has investigated **non-horizontal types of competition concerns** in horizontal mergers by analysing whether the merged entity would have the ability and the incentives to foreclose competitors by engaging in certain conducts and whether such foreclosure would have an adverse impact on competition and harm consumers.<sup>77</sup> At the same time, the application of the traditional framework for vertical and conglomerate mergers under the Non-Horizontal Merger Guidelines (“NHMG”) has been refined to adapt to the specificities of digital business models and investigate theories of harm where the acquirer may foreclose rivals by **leveraging its market power into a new market, thereby expanding its ecosystem**.
88. In some cases, in particular where non-price parameters of competition played a role, the assessment of foreclosure effects materialised in restrictions of access,<sup>78</sup> degradation of interoperability,<sup>79</sup> or self-preferencing strategies.<sup>80</sup> Furthermore, under the NHMG framework, the Commission also investigated **targeted foreclosure strategies** where, for instance, only a certain category of competitors, e.g., close competitors, would be targeted, determining in addition whether the targets of foreclosure played a sufficiently important role in the competitive process to find consumer harm.<sup>81</sup>
89. The Commission also investigated **horizontal effects of non-horizontal mergers that are not necessarily based on a foreclosure “conduct”** but that, given the market structure and market dynamics, as well as the acquirer's market power, could nonetheless lead to the strengthening or entrenchment of the acquirer's position on the market.<sup>82</sup> This may be the case e.g. where companies are not direct competitors, but where the aggregation of their assets, such as data<sup>83</sup> or customers in complementary businesses,<sup>84</sup> would strengthen the acquirer's dominant position. Another fact pattern where market structure and dynamics could lead to the strengthening or entrenchment of the acquirer's market position was investigated in cases where acquisitions took place within the acquirer's overall **ecosystem** of interrelated products or services. In these cases, concerns included the possible

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<sup>77</sup> HMG, paragraph 36.

<sup>78</sup> In case M.10262 – *Meta / Kustomer*, the Commission was concerned that Meta would restrict access to its important messaging channels (Messenger, WhatsApp, and Instagram) to foreclose the target's competing software providers that rely on Meta's channels.

<sup>79</sup> The Commission assessed more subtle foreclosure forms, e.g. degradation of interoperability by removing certain features or functionalities or reserving superior functionalities for the merged entity's products (M.9660 – Google / Fitbit), as well as hampering or delaying access to inputs, such as an API (application programming interface) (M.10262 – *Meta / Kustomer*).

<sup>80</sup> In case M.10920 – *Amazon / iRobot*, the Commission assessed whether Amazon would have the ability and incentives to foreclose rival robot vacuum cleaners by reducing their visibility in the Amazon Stores through various mechanisms.

<sup>81</sup> In case M.10262 – *Meta / Kustomer*, the Commission considered that smaller players and recent market entrants were particular drivers of innovation and that foreclosure targeting such players would lead to lower quality and less innovation in the overall market.

<sup>82</sup> HMG, paragraph 36.

<sup>83</sup> In case M.9660 – *Google / Fitbit* the Commission investigated whether Google could combine its vast database with Fitbit's health and location data to further entrench its dominant position in online advertising markets. In case M.8788 – *Apple / Shazam*, the Commission assessed the increment of Shazam's data to Apple using the ‘Four Vs’ metrics: the type of data composing the dataset (variety); the speed at which the data is collected (velocity); the size of the data set (volume); the size of the data set (value); and the economic relevance (value).

<sup>84</sup> In case M.10615 – *Booking / eTraveli*, the Commission found that the acquisition of a complementary business (flight online travel agency, “OTA”, services) amounted to an important customer acquisition channel (i.e., additional customer traffic) for the acquirer's core business in hotel OTA services.

entrenchment of the dominant company's position on the core product's market through the addition of a close complement to the core product of that company's ecosystem of products<sup>85</sup>; and possible effects on **potential competition**, for instance where the target would have been particularly well placed to enter the acquirer's markets or where the acquirer buys the target, abandoning its plans to develop the product itself (so-called reverse killer acquisitions).<sup>86</sup> The criteria for assessing effects on potential competition are discussed, in particular, in Topic C on Innovation and other dynamic elements in merger control.

90. In other cases, the Commission considered the **interconnectedness of markets** and the acquirer's ecosystem of products and services as relevant market context in a foreclosure strategy. For instance, the Commission assessed the merged entity's incentives also by investigating the gains that could materialise beyond the directly impacted market, in other parts of the acquirer's ecosystem.<sup>87</sup>
91. The Commission also investigated competition concerns in the context of **nascent markets**, i.e., emerging novel and innovative technologies with the potential of disrupting the established industry, which by their nature often comprised only a small segment of the market.<sup>88</sup>
92. Finally, the Commission has assessed **privacy and data protection concerns** in previous digital mergers. In that respect, the use of data or access to data played an important role in the Commission's merger assessment. The Commission investigated data-related issues in the framework of horizontal effects resulting from data accumulation (combination of data sets) or vertical effects, where data is an important input and could lead to foreclosure of rivals. In addition, data privacy was considered a relevant non-price parameter of competition. For instance, in M.9660 – *Google/Fitbit*, the Commission considered whether the combination of the parties' datasets could impede effective competition by providing the merged entity with control over an asset that would make the expansion or entry of rival firms more difficult, as envisaged under paragraph 36 of the HMG. In M.8124 – *Microsoft/LinkedIn*, the Commission considered whether the merged entity would engage in input foreclosure such that Microsoft could restrict access to LinkedIn data. In its assessments, the Commission explicitly considered the limitations set to the merging parties' conduct by existing privacy regulations, including the GDPR and the e-Privacy Directive. While the report "*Competition policy for the digital era*" (2019) by Cremer et al. acknowledged the important role of privacy and data protection regulation, such as the GDPR, in protecting EU citizens' privacy and data online, it further explained that competition law can nevertheless "*have the effect to protect and promote the individuals' choice also with a view to privacy policies*" [emphasis added]. In M.8124 – *Microsoft/LinkedIn*, the Commission considered privacy protection as an important quality parameter in competition between the professional social networks, and assessed the risk that the transaction could restrict consumers' choice in this respect. The question therefore arises to what extent the revised Guidelines should explicitly list privacy and data protection as a relevant parameter of competition that EU merger control needs to protect and whether additional clarification should be provided on the interplay between privacy and data protection regulations and EU merger control.

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<sup>85</sup> In M.10615 – *Booking / eTraveli*, the strengthening of Booking's dominant position in its ecosystem's core market (hotel OTA services) resulted from adding a close complement (flight OTA services). The inclusion of flights would not only result in additional customer traffic, but also would allow Booking to leverage existing customer inertia thereby strengthening the existing network effects. In addition, rivals would have likely faced higher barriers to entry/expansion as they would find it even more difficult to use flights as a path to expand into hotel OTA services.

<sup>86</sup> These types of concerns were for example assessed in case M.11033 – *Adobe / Figma*. In this case, the Commission investigated concerns related to a possible strengthening of a dominant position in the main markets of a multi-product ecosystem, through the elimination of a potential new entrant that risked "eating into" this position from the fringe. This was analysed within the framework of the potential competition test.

<sup>87</sup> M.10262 – *Meta / Kustomer*.

<sup>88</sup> For example, in M.10646 – *Microsoft / Activision Blizzard*, the Commission found foreclosure concerns for the nascent cloud game streaming, a small but growing segment of the gaming market (around 1% of the market in the EEA).

93. Privacy concerns may restrict some customers from contracting with suppliers located outside the EU or in jurisdictions that lack sufficient data protection guarantees, especially when the customer-supplier relationship poses a risk of data leaks and the safeguards included in the GDPR may not eliminate the competition issues. This factor can be considered when assessing market power. This is particularly relevant for customers handling sensitive data, such as in the health or security sectors.

## Questions

### General

- E.1. In your/your client's view, do the current Guidelines adequately reflect the evolutions linked to the digitalisation of the economy? [One option possible]
- Yes, fully
  - Yes, to some extent
  - No, to an insufficient extent
  - Not at all
  - I do not know
- E.1.1 [If 'Yes, to some extent' or 'No, to an insufficient extent' or 'Not at all'] Please explain, and mention in particular which provisions of the current Guidelines (if any) do not adequately reflect the evolutions linked to the digitalisation of the economy.
- E.2. In your/your client's view, should the revised Guidelines better reflect the evolutions linked to the digitalisation of the economy in relation to the following aspects? Please select the areas that you believe the revised Guidelines should address: [Multiple options possible]:
- "Tipping"/"Winner takes most" dynamics
  - Network effects
  - Chilling effects
  - Customer inertia (de facto lack of switching)
  - Data-driven competition
  - Privacy protection-driven competition
  - Market power entrenchment theories of harm
  - Potential competition theories of harm
  - Ecosystem and interrelated products or services' theories of harm /
  - Data accumulation theories of harm
  - Targeted foreclosure theories of harm
  - Degradation of interoperability theories of harm
  - Future technological changes
  - Other
- E.2.1 Please provide a reasoning for the aspects you have selected and explain how the revised Guidelines should address these aspects.

*The questions below are inspired by the specific competitive dynamics observed in the context of the digitalisation of the economy, as described in the topic description. However, when replying, please consider that the questions do not relate to mergers in the digital and tech industries only. Many of the dynamics and concepts on which we seek your feedback below are relevant across industries.*

### **Competitive dynamics and parameters of competition**

- E.3. How should the Commission take into account the following competitive dynamics in its assessment of the impact of mergers on competition?

- a. “Tipping”/“Winner takes most” dynamics [Free text]
  - b. Network effects [Free text]
  - c. Customer inertia [Free text]
  - d. Data-driven competition [Free text]
  - e. Privacy protection-driven competition [Free text]
  - f. Multi-sidedness of markets [Free text]
  - g. Other competitive dynamics you consider relevant [Free text]
- E.4. What other elements linked to the digitalisation of the economy do you consider are highly relevant for the Commission’s merger assessment? Please provide a reasoning for each element and explain how the Commission should take them into account. [Free text]

***General frameworks of analysis and Entrenchment***

- E.5. From your perspective and considering modern competitive dynamics, do you consider that having different frameworks of analysis for horizontal relationships (when merging companies are active on the same market) and for non-horizontal relationships (when merging companies are active on different markets) is still relevant? [One option possible]
- a. Yes
  - b. No
  - c. I do not know
- E.5.1. Please explain. Please also explain under what framework the Commission should assess potential counterstrategies or retaliation by competitors in the assessment of foreclosure strategies of the merged entity?
- E.6. How should the current frameworks of analysis for horizontal and for non-horizontal relationships be adapted to assess the effects that digital and tech mergers can have on competition? In particular, please explain which framework of analysis you believe would capture adequately the effects of digital and tech mergers on competition when a leading company seeks to acquire a complementary business and may entrench its market power as a result.
- E.7. How should the Commission assess competition risks of non-horizontal mergers that are not based on a foreclosure conduct by the merged entity? In your reply, you may consider also mergers outside of the digital and tech industries.
- E.7.a Please explain in particular: What theory/theories of harm could the Commission consider.
  - E.7.b Please explain in particular: Under which conditions or market circumstances could this/these theory/theories of harm materialise.
  - E.7.c Please explain in particular: What are the elements, including relevant factors, evidence and metrics, that the Commission could use to assess the competition risks of non-horizontal mergers beyond a foreclosure conduct.
- E.8. How should the Commission assess possible theories of harm to competition linked to increased barriers to entry and expansion of rivals, including on the application of paragraph 36 of the Horizontal Merger Guidelines (“HMG”)? What specific elements should the Commission focus on?

***Ecosystem and Interrelated products***

- E.9. How should the Commission assess competition risks of non-horizontal mergers linked to having a broad range or portfolio of products or services that are interrelated or part of an “ecosystem”? Please consider also mergers outside of the digital and tech industries and explain in particular:
- E.9.a What theory/theories of harm could the Commission consider. [Free text]

- E.9.b Under which conditions or market circumstances could this/these theory/theories of harm or concerns materialise. [Free text]
- E.9.c What are the elements, including evidence and metrics, that the Commission could use to assess the potential competition risks linked to having an increased portfolio of interrelated products and services. [Free text]

***Data-related concerns and Aggregation of data***

- E.10. How should the Commission assess competition risks linked to the merged entity's accumulation of data? Please consider also mergers outside of the digital and tech industries and explain in particular:
  - E.10.a What theory/theories of harm could the Commission consider. [Free text]
  - E.10.b Under which conditions or market circumstances could this/these theory/theories of harm materialise. [Free text]
  - E.10.c What are the elements, including evidence and metrics, that the Commission could use to assess competition risks linked to the accumulation of data. [Free text]
- E.11. How should the Commission assess the relevant standard and criteria determining the value of the target's data in the context of data aggregation? Please select and explain the relevant criteria in the context of data accumulation that would be determinative for assessing the value of the data: [Multiple options possible]
  - a. Velocity (i.e., speed at which the data is collected)
  - b. Variety (i.e., type of data composing the data set)
  - c. Value (i.e., economic relevance of data)
  - d. Volume (i.e., size of the data set)
  - e. Quality of data (e.g., completeness, cleanliness of a data set)
  - f. Uniqueness / difficult to replicate
  - g. Accessibility
  - h. Other
  - E.11.1 Please explain the relevant criteria you have selected.

***Targeted foreclosure***

- E.12. How should the Commission assess competition risks linked to targeted foreclosure conducts (e.g. conducts that lead to only some competitors being fully or partially foreclosed, or to partial restriction or degradation of access to key inputs or other products or services)? Please consider also mergers outside of the digital and tech industries and explain in particular:
  - E.12.a What theory/theories of harm could the Commission consider? [Free text]
  - E.12.b Under which conditions or market circumstances could this/these theory/theories of harm materialise? [Free text]
  - E.12.c What are the elements, including evidence and metrics, that the Commission could use to assess competition risks linked to targeted foreclosure conducts? [Free text]

***Interoperability issues and access issues***

- E.13. How should the Commission assess competition risks linked to access and interoperability concerns resulting from a non-horizontal merger? Please consider also mergers outside of the digital and tech industries and explain in particular:
  - E.13.a What theory/theories of harm could the Commission consider? [Free text]

- E.13.b Under which conditions or market circumstances could this/these theory/theories of harm materialise. In particular, not to impede effective competition, should the Commission establish that post-merger there will be sufficient interoperability and access for all companies to compete, or that the interoperability will be the same for all companies, so there is no competitive advantage for the merged entity's products and services? [Free text]
- E.13.c What are the elements, including evidence and metrics, that the Commission could use to assess competition risks linked to access or interoperability issues? [Free text]

***Future market dynamics and technological changes***

- E.14. In markets driven by technological changes, what would be an appropriate timeframe for the Commission to adequately assess the impact of mergers on competition? Should there be a distinction between markets before and after "tipping" to a leading company?
- E.15. What metrics and evidence should be used to adequately assess likely future market trends and developments post-merger, including in terms of business models, technologies, and trade patterns?

***Privacy and data protection***

- E.16 Do you consider that the Commission's past case practice regarding privacy and data protection considerations (e.g., in M.8788 - Apple/Shazam, M.9660 - Google/Fitbit) was appropriate? If not, please outline in detail where you disagree with the approach taken by the Commission.
- E.17 Please outline the framework within which the revised Guidelines should reflect privacy and data protection considerations, if at all. Please outline how this framework fits within the legal mandate set by the EU Merger Regulation.
- E.18 Do you believe the revised Guidelines should provide guidance on the relationship between data protection and privacy considerations and the availability of sufficient alternatives and market power? If so, please outline the framework you would propose for addressing the interplay between privacy and data protection regulation (e.g., the GDPR) and the EU Merger Regulation.