

Unclassified

English - Or. English

25 May 2020

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

## **Start-ups, killer acquisitions and merger control – Note by the European Union**

11 June 2020

This document reproduces a written contribution from the European Union submitted for Item 2 of the 133<sup>rd</sup> OECD Competition Committee meeting on 10-16 June 2020.  
More documents related to this discussion can be found at  
<http://www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control.htm>

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**JT03462038**

## *European Union<sup>1</sup>*

### 1. Introduction

1. One of the most topical issues raised in recent years in the field of merger control is the assessment of acquisitions of nascent, innovative companies by strong incumbents.

2. Such acquisitions have been sometimes called “killer acquisitions”, implying that the incumbents are acquiring the targets solely to discontinue and thus effectively “kill” their innovation projects to pre-empt future competition. This phenomenon has been observed and empirically studied in particular in respect of the pharmaceutical sector. In a paper of 2018 the authors estimated that between 5.3% and 7.4% of acquisitions in their sample from the pharmaceutical industry were carried out with the sole purpose of discontinuing the targets’ drug projects.<sup>2</sup>

3. This concern has also been voiced in the digital sector, where the observed high number of acquisitions of start-ups by large companies has attracted attention and calls for more antitrust scrutiny. A report of March 2019 prepared for the UK government by a panel headed by Professor Jason Furman (“the Furman Report”<sup>3</sup>) notes, for instance, that a few major digital companies have acquired around 400 targets in the previous ten years, without any transaction being prohibited. In addition, targets appear to consist of relatively young companies, being four years old or younger in the majority of cases.<sup>4</sup>

4. It should nevertheless be noted that concerns regarding discontinuation or “killing” of innovative projects are not necessarily characteristic only to the acquisitions of start-ups but may also arise in mergers of established companies, requiring competition authorities to analyse the effects of these transaction on potential competition and innovation.

5. Further, not all “acquisitions of nascent companies” are “killer acquisitions”, in a pure sense. Especially in the digital sector, concerns around acquisitions of innovative companies are not limited to incumbents “killing” their research projects or their operations before they grow into a significant competitive threat in the same market where the acquiring platform is already active. Large digital companies might also acquire a number of small and large businesses over time, not to shut down their innovation projects, but to integrate them and the ensuing products and services in their growing ecosystems.<sup>5</sup> While the transaction in those constellations may have a plausible efficiency rationale, the

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<sup>1</sup> Directorate-General for Competition, European Commission (hereafter “the Commission”).

<sup>2</sup> Cunningham, Colleen and Ederer, Florian and Ma, Song, “Killer Acquisitions” (version of 19 April 2020). Available at SSRN: <https://ssrn.com/abstract=3241707> or <http://dx.doi.org/10.2139/ssrn.3241707>.

<sup>3</sup> “Unlocking Digital Competition – Report of the Digital Competition Expert Panel” (March 2019). Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/785547/unlocking\\_digital\\_competition\\_furman\\_review\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf).

<sup>4</sup> “Ex-post Assessment of Merger Control Decisions in Digital Markets” (9 May 2019), prepared by Lear for the UK Competition and Markets Authority. Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/803576/CMA\\_past\\_digital\\_mergers\\_GOV.UK\\_version.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803576/CMA_past_digital_mergers_GOV.UK_version.pdf).

<sup>5</sup> For example, following its acquisition of WhatsApp, Facebook did not shut down this app, migrating users to its own Facebook Messenger, but continued growing WhatsApp and introducing new features, including those planned by WhatsApp pre-merger, such as end-to-end encryption.

combination of complementary activities might cement the merged entity's strong position, giving it a significant competitive advantage over its rivals. For example, competition might be reduced and consumers harmed if other players would find it more difficult to compete against the incumbent's integrated offering, which would attract and more easily retain consumers within its ecosystem through a "platform envelopment" strategy.<sup>6</sup> Rivals would have to offer more services and compete across a range of related markets to survive.

6. While the first set of concerns focuses on the horizontal effects resulting from the elimination of a potential or innovative rival due to a "killing" strategy, the second one relates generally to non-horizontal effects stemming from the expansion of a platform into neighbouring markets.<sup>7</sup>

7. Regardless of the substantive assessment, small, young targets often do not yet generate significant sales. Their acquisitions may thus not be caught by turnover-based notification thresholds, like the ones underpinning EU merger control, and escape merger scrutiny altogether. For example, the abovementioned study concerning the pharmaceutical sector found that the "killer acquisitions" disproportionately occurred just below thresholds for antitrust review. This risk is even more pronounced in the digital sector, since the business model of many companies is such that they are not initially focused on generating income, but on growing their customer base. Their competitive potential might therefore not be reflected by the size of their (still) small turnover.

8. Competition authorities worldwide have thus to ask themselves how to carry out the challenging assessment of the competitive consequences of the elimination of possible future or innovative competitors or their development through integration in a larger ecosystem. Any questions over the nature of the substantive assessment appropriate for such cases, however, are preceded by jurisdictional questions. In that respect, enforcers face the challenge of balancing the different needs of a merger control system as it needs to capture all types of competitively significant concentrations and, at the same time, offer legal certainty to merging companies (regarding the question whether or not a notification is required and, in the absence of a notification, how long and under which conditions the deal may still be challenged) and ensure a review as efficient as possible, focusing resources on potentially problematic cases.

## 2. Jurisdictional aspects

9. In the EU, mergers may be reviewed either at the Member State level by national competition authorities or, for mergers which may have a wider, cross-border impact in the EU, at the EU-level by the Commission.

10. The EU Merger Regulation provides for a mandatory, *ex ante* notification system for all concentrations which meet certain specified thresholds. The jurisdictional thresholds set out in Article 1 of the EU Merger Regulation are defined by reference to the turnover (i.e. amount derived from the sale of products and the provision of services) realised by the parties concerned,<sup>8</sup> rather than by reference to the transaction value (i.e. the consideration

<sup>6</sup> "Competition Policy for the Digital Era", report by Crémer, de Montjoye and Schweitzer (April 2019). Available at: <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.

<sup>7</sup> Following the instructions of the call for contributions for this Roundtable, this note will leave aside issues relating to conglomerate theories of harm, which will be subject of a separate Roundtable.

<sup>8</sup> Pursuant to Article 1(1) of the EU Merger Regulation, concentrations that have a so-called Union dimension are subject to the Commission's review under the EU Merger Regulation. Pursuant to Article 1(2) of the EU Merger Regulation, a concentration has a Union dimension where:

paid for the target) or any other parameters (such as market shares, number of users, etc.). The minimum individual turnover in the EU that each of at least two of the undertakings concerned have to reach for a concentration to have Union dimension is EUR 250 million pursuant to Article 1(2) of the EU Merger Regulation and EUR 100 million pursuant to Article 1(3) of the EU Merger Regulation.

11. The notification obligation for concentrations meeting the turnover thresholds is supplemented by the referral system. The Commission can come to review concentrations, which do not meet the thresholds of the EU Merger Regulation, on the basis of referrals from national competition authorities under Article 4(5) (where the concentration is notifiable in at least three Member States) or Article 22 (where the concentration affects trade between Member States and threatens to significantly affect competition within the Member State(s) making the referral request) of the EU Merger Regulation.

12. Cases recently referred to the Commission illustrate that the referral system of the EU Merger Regulation continues to bring relevant transactions below the thresholds under the jurisdiction of the Commission, including in the digital sector. Examples of digital mergers reviewed by the Commission thanks to the referral mechanism include *Microsoft/GitHub* (2018), *Apple/Shazam* (2018), *Amadeus/Navitaire* (2016), *Lenovo/Motorola Mobility* (2014), *Facebook/WhatsApp* (2014), *Cisco/Tandberg* (2010), *Google/DoubleClick* (2008), *TomTom/TeleAtlas* (2007) and *Nokia/Navtek* (2007). As far as the referral system is concerned, any changes that the Member States make to their national notification thresholds can have follow-on effects on the potential for referrals to the Commission, in particular since it may affect the fulfilment of the three-Member State requirement under Article 4(5) of the EU Merger Regulation, mentioned in paragraph 11.

13. The Commission regularly re-examines its competition tools and processes, reforming or adapting them where appropriate to ensure that they continue to fulfil their role. That is why the Commission's ongoing Evaluation of procedural and jurisdictional aspects of EU merger control<sup>9</sup> seeks among others to assess the effectiveness of the current turnover-based thresholds of the EU Merger Regulation to capture all transactions which could potentially affect competition in the internal market and in particular acquisitions of highly valued targets with as yet limited turnover. The Evaluation is on-going and the

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(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and

(b) the aggregate Union-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Union-wide turnover within one and the same Member State.

Moreover, Article 1(3) of the EU Merger Regulation provides that a concentration that does not meet the thresholds laid down in paragraph 2 has a Union dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million;

(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;

(c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and

(d) the aggregate Union-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

<sup>9</sup> [https://ec.europa.eu/competition/consultations/2016\\_merger\\_control/index\\_en.html](https://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html).

Commission will summarize its findings in a Staff Working Document once it has collected and assessed all the relevant facts.

14. As part of that Evaluation, the Commission launched a public consultation in October 2016 to assess, among other issues, the possible need to capture important acquisitions of low-turnover targets by introducing additional notification thresholds based, for example, on the transaction value. The Commission has published the non-confidential versions of the contributions received on its website.<sup>10</sup>

15. The Commission is also conducting additional research to understand the existence and breadth of any possible enforcement gap. To that end, it is analysing high-value low-turnover transactions that could be escaping its jurisdiction. While this research and the reflection stemming from it is ongoing, at this stage, it confirms that there are numerous transactions with high deal values every year which do not fall under the scope of application of the EUMR. A number of them concern specifically cases of high-value/low-turnover deals. The Commission's preliminary research also shows, however, that many of those large deals do not appear to have sufficient local nexus with the European Economic Area (EEA). Among those cases that could have sufficient local nexus, some could constitute candidate cases for non-simplified treatment under the EU Merger Regulation, that is to say, they could have merited (at least a basic) investigation. Whether some of those cases would have led to interventions, however, is less clear.

16. Numerous stakeholders have raised the potential difficulties of establishing a value-based threshold at a level that would allow to capture all potentially significant cases without also capturing many other non-relevant transactions. They have also noted that establishing the value of the transaction might be difficult in cases where it is not accomplished by a simple cash transfer and that setting up a workable local nexus test might be particularly difficult in respect of digital and pharmaceutical markets, where the products might have a potential to be sold worldwide, but are still in the pipeline and are not marketed yet or their potential might not be yet realised.

17. The Commission's research into these issues is still on-going. The Commission is also closely following the experiences with recently introduced value based-thresholds at national level in Austria and Germany.

18. On 4 April 2019, the three special advisers appointed by Commissioner Vestager delivered their report on if and how competition policy should be adapted to the future challenges of digitisation. With respect to digital mergers, the report concluded that it is premature to change the notification thresholds of the EU Merger Regulation but it is necessary to continue monitoring the issue.<sup>11</sup> These reflections will also feed into the Commission's Evaluation.

### 3. Substantive analysis

19. The substantive analysis of acquisitions of small, innovative targets by large incumbents raises complex issues which are common to the review also of other types of transactions, such as identifying the plausible theories of harm (discussed below under (a)), measuring market power (discussed under (b)), establishing the right counterfactual (discussed under (c)) as well as assessing potential competition and effects on innovation (discussed under (d)). In killer acquisitions or acquisitions of nascent competitors, these

<sup>10</sup> Available at: [https://ec.europa.eu/competition/consultations/2016\\_merger\\_control/index\\_en.html](https://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html).

<sup>11</sup> "Competition Policy for the Digital Era", report by Crémer, de Montjoye and Schweitzer (April 2019), page 115.

issues are often more pronounced, however, or take a distinct form, as for instance, the markets may be characterized by the presence of platforms and their specific dynamics (discussed under (e)). Nevertheless, in the Commission’s experience, the main concepts and tools of EU merger control appear sufficiently flexible and sound to cope with these challenges.

### 3.1. Potential theories of harm: horizontal, vertical or conglomerate effects

20. Under the legal test of the EU Merger Regulation, the Commission is required to assess whether or not a transaction would “*significantly impede effective competition*” in the EU internal market, in particular as a result of the creation or strengthening of a dominant position.<sup>12</sup> While dominance is not a pre-requisite for establishing competition concerns, it is mentioned as an important example of a problematic merger.<sup>13</sup>

21. In each of its merger investigations, the Commission tests all plausible theories of harm. They are determined based on the specific circumstances of each case: the parties’ activities, functioning of the industry/markets, submissions and evidence from the parties and third parties, etc. Like in other mergers, the theories of harm in killer acquisitions or acquisitions of nascent competitors may be horizontal (for example, related to potential competition or innovation), vertical (for example, related to access to data, technology or platforms) or conglomerate (regarding the offering of a range of products by the merged entity, leading to foreclosure of competitors).

22. As acquisitions of nascent competitors, particularly in the digital sector, are characterised by purchases by large incumbents of nascent peers, such transactions may create or strengthen the dominant position of the acquirer. If the target exerts (potential) competition in the incumbent’s market, this may occur by eliminating one of the few remaining competitive constraints. If the target operates in different (but possibly adjacent) markets, this may occur in particular due to raising barriers to entry/expansion for competitors (for example, related to network effects, data or technology) or otherwise allowing the merged entity to hinder competitors’ expansion<sup>14</sup> or to reduce their ability or incentive to compete<sup>15</sup>.

23. These ideas were further developed in the report delivered in April 2019 by the three special advisers appointed by Commissioner Vestager to analyse the challenges of digitisation for EU competition policy, mentioned in paragraph 18 above. With respect to digital mergers, the report concludes that the current substantive test of the EU Merger Regulation remains a sound basis for assessing mergers in the digital economy. However, the report also proposes to revisit certain theories of harm. In particular, the report recommends to apply to a greater extent horizontal analysis, where a dominant acquirer operating a multiproduct platform or ecosystem and benefiting from strong network effects acquires a nascent target in the same “users’ space”.<sup>16</sup> Such acquisition can eliminate a potential competitive threat (which will often be possible only from the fringe) and further lock users within their ecosystem. The report also argues that in such cases the notifying

<sup>12</sup> Article 2(2) and (3) of the Merger Regulation.

<sup>13</sup> Prior to 2004, until the current EU Merger Regulation entered into force, the creation or strengthening of a dominant position was the only situation in which the Commission could find competition concerns.

<sup>14</sup> See, for example, paragraph 36 of the Horizontal Merger Guidelines.

<sup>15</sup> See, for example, paragraph 15 of the Non-Horizontal Merger Guidelines.

<sup>16</sup> “Competition Policy for the Digital Era”, report by Crémer, de Montjoye and Schweitzer (April 2019), pages 121-123.

parties should bear the burden of showing that the adverse effects on competition are offset by merger-specific efficiencies.

### 3.2. Measuring market power

24. One of the first issues which competition authorities face when analysing acquisitions of nascent competitors in the digital industry is the measuring of market power held by the merging parties, which often requires the use of novel metrics. Since many digital services are offered for free (and are monetised through other means or in different markets), it may be impossible to calculate market shares in terms of turnover and alternative metrics may be more suitable, such as the shares of volume of transactions or shares of users.

25. In each case, the Commission tries to understand the most representative metric for the respective industry/market. For example, the Commission may analyse the share of volume of transactions which can be based on the number of clicks, number of messages sent in a communication app, time spent on a platform/app, etc. The Commission may also rely on the share of users for which it may be necessary to determine which type of users is the most representative (such as registered users, monthly active users (MAU) or daily active users (DAU)) and to account for multi-homing of some users. Where relevant, the Commission may also use several metrics for a more comprehensive assessment.

26. Moreover, it is important to understand how indicative market shares are of market power in each particular case. While in some fast-moving markets with short innovation cycles large market shares may be “ephemeral”,<sup>17</sup> they may be more representative of market power in other markets, including digital, with entrenched incumbents, high barriers to entry (such as network effects) and considerable switching costs.

### 3.3. Establishing the counterfactual

27. Another important challenge in acquisitions of nascent competitors is establishing the right counterfactual. To establish competitive effects, the Commission has to compare the respective conditions of competition in the presence and absence of the merger. In most mergers, the best indicator for identifying the relevant counterfactual is the prevailing conditions of competition on the market.<sup>18</sup> However, in acquisitions of nascent competitors, the current reality may be a poor proxy for the situation absent the merger, given the high potential of the young target and dynamic nature of the markets. Hence, in addition to the situation post-merger, the Commission has to predict also the likely evolution of the target absent the merger (e.g. whether the target’s novel pipeline products/services will succeed, whether it will pivot to another area to directly compete with the acquirer, etc.).

28. While merger control is by definition a forward-looking exercise, making an accurate prediction as to the future of a nascent, fast-growing company in a dynamic market is particularly challenging. The Commission uses all sources of information available to it, including internal documents of the target, of the acquirer and, in specific cases, of third parties (with documents created *in tempore non suspecto* having greater probative value), replies/submissions of other market participants (mainly customers and competitors), public statements of the parties, reports of industry experts, etc. The importance of predicting the future evolution of the target may be lower in cases where the Commission

<sup>17</sup> Judgment in Case T-79/12 *Cisco and Messagenet v Commission*, paragraph 69.

<sup>18</sup> Horizontal Merger Guidelines, paragraph 9.

is able to establish that, despite not yet actually competing in the relevant market, the target already exerts a significant constraining influence on the acquirer.<sup>19</sup>

### 3.4. Potential competition and innovation effects

29. Killer acquisitions and acquisitions of nascent competitors are particularly prone to having an impact on potential competition and innovation, given the emerging activities of the target and the importance of innovation in the relevant industries.

30. The Commission's framework for the assessment of potential competition and innovation is set out in its merger guidelines. In particular, the Commission's Horizontal Merger Guidelines<sup>20</sup> clarify that a merger with a potential competitor can have similar anti-competitive effects to mergers between two undertakings already active on the same relevant market.<sup>21</sup> For a merger with a potential competitor to have significant anti-competitive effects (i) the potential competitor must already exert a significant constraining influence or there must be a significant likelihood that it would grow into an effective competitive force; and (ii) there must not be a sufficient number of other potential competitors.<sup>22</sup>

31. With respect to innovation, the Horizontal Merger Guidelines expressly mention innovation as one of the benefits of effective competition.<sup>23</sup> Innovation is among the criteria against which the Commission assesses the likely effects of a merger, and in particular whether the merger would eliminate an important competitive force.<sup>24</sup> A firm with a relatively small market share may be such an important competitive force if it has promising pipeline products.<sup>25</sup> In the Horizontal Merger Guidelines, a merger involving pipeline products related to a specific product market is specified as only an example of how a merger can affect innovation, however,<sup>26</sup> and hence other constellations are possible.

32. A typical example of a potential competition case is a concentration in which pipeline products of one merging party overlap with the existing or pipeline products of the other merging party ("pipeline-to-existing" and "pipeline-to-pipeline" overlaps, respectively). These pipeline products are usually relatively developed, within sight for commercialisation, and known to target specific product markets. By contrast, innovation cases may deal with earlier-stage innovation projects of the parties, which may not yet have taken the shape of concrete products and have yet an uncertain probability of success. Such innovation efforts may target an existing product market but may also take place upstream,

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<sup>19</sup> Horizontal Merger Guidelines, paragraph 60.

<sup>20</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, Official Journal C 31, 5.2.2004. p. 5-18.

<sup>21</sup> Horizontal Merger Guidelines, paragraph 58.

<sup>22</sup> Horizontal Merger Guidelines, paragraph 60.

<sup>23</sup> EU merger control recognises that mergers can also foster innovation (Horizontal Merger Guidelines, paragraphs 38 and 81; similarly, in relation to non-horizontal mergers, see Commission's Non-Horizontal Merger Guidelines, paragraph 13). The Horizontal Merger Guidelines explain that some mergers can increase the firms' ability and incentives to innovate, thereby also increasing the competitive pressure on rivals to create new goods and services. Such effects are typically assessed by the Commission in the context of efficiency submissions by the parties

<sup>24</sup> Horizontal Merger Guidelines, paragraphs 37-38.

<sup>25</sup> Horizontal Merger Guidelines, paragraph 38.

<sup>26</sup> This follows from the words "for instance" in paragraph 38 of the Horizontal Merger Guidelines and clarification that the list of the listed factors is not exhaustive in paragraph 26 of the Horizontal Merger Guidelines.

in wider innovation areas (or “innovation spaces”) which may ultimately produce output for several product markets.

33. One of the chief concerns in potential competition and innovation cases is the discontinuation, delay or re-orientation of pipelines or innovation efforts of one merging party due to their overlap with the innovation activities or existing products of the other merging party.<sup>27</sup> Furthermore, even if the discontinuation, delay or re-orientation are unlikely and the project would be developed as planned, the merger would still bring two overlapping products under control of one entity, and thus result in the loss of product market competition and likely adverse price/quality effects.

34. As regards the Commission’s decisional practice, potential competition and innovation frequently feature in the Commission’s assessment of mergers. While not all of those cases involve small, nascent companies, they still provide a useful illustration of the Commission’s analysis of potential competition and innovation effects.

35. In the pharmaceutical and medical device sectors, which are highly R&D intensive, the Commission regularly identifies competition concerns related to the overlaps in the parties’ pipeline products, including those in relatively early stages. *J&J/Actelion* (2017),<sup>28</sup> *Novartis/GSK oncology business* (2015)<sup>29</sup> and *Medtronic/Covidien* (2014)<sup>30</sup> are three examples of cases where the Commission found that the merged entity would have been likely to rationalise its R&D programmes by discontinuing, delaying or re-orienting one of the Parties’ R&D activities. The Commission also performed in-depth potential competition and innovation analysis in the two agrochemical mergers<sup>31</sup> *Dow/DuPont* (2017)<sup>32</sup> and *Bayer/Monsanto* (2018).<sup>33</sup> An interesting feature of the Commission’s analysis in those cases was its focus not only on specific product markets but also on broader innovation spaces, i.e. the areas at which the parties targeted their R&D activities (e.g. combinations of specific crops and pests). In both of these mergers, the merging parties were found to be important innovators, in the presence of only a limited number of other innovative competitors and high barriers to entry.

36. In the digital sector, the Commission has not so far applied an elaborate analysis of merger effects on innovation. Partly, this can be explained by the challenge that innovation in digital markets often follows a quicker and much less structured process than

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<sup>27</sup> By contrast, absent the merger, consumers would potentially benefit from two products/services offered by two independent suppliers. An example is provided by the reported discussions within Google to acquire Zoom, a video communication app, in 2018. Those discussions did not materialise and instead Google decided to outcompete Zoom (source: <https://seekingalpha.com/news/3568273-google-engineers-eyed-zoom-purchase-in-2018-report>; accessed on 8 May 2020). Today, consumers benefit from two apps, Zoom and Google Hangouts/Meet offered by two independent providers.

<sup>28</sup> Case M.8401 *J&J/Actelion*, Commission decision of 9 June 2017.

<sup>29</sup> Case M.7275 *Novartis/GSK oncology business*, Commission decision of 28 January 2015.

<sup>30</sup> Case M.7326 *Medtronic/Covidien*, Commission decision of 28 November 2014.

<sup>31</sup> Potential competition and innovation also play a role in industrial mergers. In Case M.7278 *GE/Alstom*, the transaction brought together two major players in the market for 50 Hertz heavy duty gas turbines. The Commission found that GE would have likely discontinued Alstom’s specific products under development, thus depriving customers of new and innovative machines and future technology upgrades. In addition, there was a broader innovation concern, since specific evidence from GE’s post-closing integration plans showed that GE was likely to eliminate most of Alstom’s R&D capabilities related to heavy duty gas turbines.

<sup>32</sup> Case M.7932 *Dow/DuPont*, Commission decision of 27 March 2017.

<sup>33</sup> Case M.8084 *Bayer/Monsanto*, Commission decision of 21 March 2018.

in more traditional industries, such as pharmaceuticals or agrochemicals, making it harder to identify innovation spaces and making it harder to predict likely future developments. Also, due to overlaps between the concepts and theories of harm, innovation effects may have been analysed in the context of other theories of harm in the digital mergers reviewed by the Commission. For example, in *Microsoft/LinkedIn* (2016)<sup>34</sup>, when analysing the vertical input foreclosure theory of harm, the Commission found it unlikely that, if post-merger LinkedIn full data were used only by Microsoft to improve its customer relations management product through machine learning, this would reduce innovation by Microsoft's competitors, in particular due to the limited relevance of LinkedIn full data for competing in customer relations management software.<sup>35</sup>

### 3.5. Issues linked specifically to platforms

37. As mentioned in paragraph 5, the digital mergers that the Commission has reviewed to date did not raise the issues of “killing” the target’s product/service but rather aimed at integrating it into the acquirer’s platform/ecosystem. The Commission has reviewed a number of mergers involving digital platforms, such as *Facebook/WhatsApp* (2014),<sup>36</sup> *Microsoft/LinkedIn* (2016)<sup>37</sup> and *Apple/Shazam* (2018).<sup>38</sup> Mergers involving digital platforms can raise a number of specific issues two of which merit highlighting here.

38. First, platforms may play a dual role in the markets: the platform may both define the rules of access to it and itself compete within it. Competition concerns may arise if as a result of a merger a platform owner enters a market for which the platform constitutes an important entry point and could use its “dual role” to marginalise competitors. This can be achieved, for example, as a result of pre-installation, higher level of integration of the platform owner’s products, and reduction of interoperability of competitors’ products with the platform. The Commission’s decision in *Microsoft/LinkedIn* is an example of a merger where remedies were required to address a concern of this type.

39. Second, data may play an importance role: platforms may hold large amounts of data which may be combined and enhanced thanks to a merger. A difficult exercise is to assess the data’s importance for competition. One example of such assessment is *Apple/Shazam*, where the Commission benchmarked the data collected by the parties against other comparable datasets available on the market, using four relevant metrics: 1) the variety of the data composing the dataset; 2) the speed at which the data are collected (velocity); 3) the size of the data set (volume); and 4) the economic relevance (value).<sup>39</sup>

## 4. Conclusion

40. Faced with transactions involving nascent and innovative targets, the existing EU turnover thresholds combined with the flexibility provided by the referral mechanism in the EU Merger Regulation have allowed the Commission to review a number of these

<sup>34</sup> Case M.8124 *Microsoft/LinkedIn*, Commission decision of 6 December 2016.

<sup>35</sup> *Ibid*, paragraphs 273-276.

<sup>36</sup> Case M.7217 *Facebook/WhatsApp*, Commission decision of 3 October 2014.

<sup>37</sup> Case M.8124 *Microsoft/LinkedIn*, Commission decision of 6 December 2016.

<sup>38</sup> Case M.8788 *Apple/Shazam*, Commission decision of 6 September 2018.

<sup>39</sup> For a more detailed overview of the assessment of data issues in EU competition law, see the Commission’s submission to the OECD Roundtable on “Consumer Data Rights and Impact on Competition” (12 June 2020).

transactions. Nevertheless, the Commission is carrying out an assessment of whether the current EU regime allows to sufficiently capture important acquisitions of low-turnover targets which may have an impact on competition in the EU internal market.

41. With respect to the substantive assessment, the Commission assesses each case on its merits, relying on its existing tools and further developing its analytical framework of acquisitions of innovative targets by larger companies. In the Commission's experience, the main concepts and tools of EU merger control appear sufficiently flexible and sound to cope with these challenges.