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Digital Merger Control: Adapting Theories of Harm – Note by Viktoria Robertson

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More documents related to this discussion can be found at:
https://www.oecd.org/competition/theories-of-harm-for-digital-mergers.htm

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Digital Merger Control: Adapting Theories of Harm

by Viktoria H.S.E. Robertson[1]

> *In examining this merger we concentrated on the significance of the acquisition for Meta's overall strategy. Kustomer may become a relevant element of this in future. However, 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.*
>
> *Andreas Mundt (February 2022)*[2]

1. Introduction

1. Unease has been growing over the rising concentration in digital markets – not just at the German Bundeskartellamt, as the quote above indicates, but on a global scale. The European Commission recently changed its approach to accepting merger referrals from national competition authorities so as to allow for a greater number of digital mergers to reach it.[3] At the same time, the Commission also proposed the Digital Markets Act, an instrument that not only obliges Big Tech companies ('gatekeepers') to inform the Commission of any planned acquisition even below the threshold of merger notification,[4] but also provides the Commission with the power to prohibit Big Tech from any further acquisitions should the Digital Markets Act's substantive rules be systematically disregarded.[5] The US Federal Trade Commission has brought an action asking for the breaking up of Facebook's mother company Meta, against the background of competition concerns related to Facebook's acquisition of Instagram and WhatsApp.[6] The US

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[2] Andreas Mundt, President of the German Bundeskartellamt, upon the authority's unconditional clearance of Meta's acquisition of Kustomer; see Bundeskartellamt, 'Bundeskartellamt clears acquisition of Kustomer by Meta (formerly Facebook)' (11 February 2022) <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2022/11_02_2022_Meta_Kustomer.pdf?__blob=publicationFile&v=2>.

[3] European Commission, Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases (Article 22 Guidance) [2021] OJ C113/1.

[4] Article 14 of 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.

[5] Article 18 para 2 DMA.

[6] US District Court for the District of Columbia, Case 1:20-cv-03590, *FTC v Facebook* (pending).

Department of Justice recently sued Google for monopolisation in digital advertising technologies, against the backdrop of Google's acquisition of DoubleClick in 2008.[7] And under a recently proposed Bill, digital companies with 'strategic market status' must report any envisaged merger to the UK's Consumer & Markets Authority, enabling it to review such mergers.[8]

2. Despite this growing unease as regards digital platforms and the rising number of platform acquisitions over the past 20 years,[9] very few digital acquisitions have actually been challenged – and only two Big Tech acquisition were outright banned, namely Meta's acquisition of Giphy in (2022) and Microsoft's acquisition of Activision (2023),[10] both in the UK. There are three possible reasons for this seeming inaction on the part of competition authorities:[11]

1. Digital concentration raises no competition concerns.
2. Competition authorities do not have jurisdiction to review digital mergers.
3. There are no adequate theories of harm to capture the competition concerns that arise in digital mergers.

3. It is these three hypotheses that the present contribution looks at in turn. While the first two hypotheses provide an important backdrop to the broader discussion on digital mergers, the focus is on the theories of harm that have come to play a role in the substantive assessment of digital mergers.

4. The **first part** of this contribution (section 2) sets out the growing concentration in digital platform markets and explores possible competition concerns related to this concentration.

5. The **second part** of this contribution (section 3) sheds light on extant requirements for establishing jurisdiction over a digital concentration, as this is a necessary requirement before any substantive assessment can take place. Apart from traditional turnover thresholds, different merger control regimes have implemented other jurisdictional thresholds that more easily allow competition authorities to assess the acquisition of digital start-ups, including transaction value thresholds and market share thresholds.

6. In its **third part** (section 4), this contribution focuses on possible theories of harm in digital mergers. Traditional theories of harm relating to horizontal, vertical and conglomerate concerns continue to be at the centre of the substantive analysis of digital mergers, and so it is important to assess to what extent these theories of harm can be adapted to the specific market circumstances found in digital platform markets. It is possible that

[7] US District Court for the Eastern District of Virginia, Case 1:23-cv-00108, *US v Google* (pending).

[8] See Chapter 5 of the proposed Digital Markets, Competition and Consumers Bill (25 April 2023).

[9] See Geoffrey Parker, Georgios Petropoulos and Marshall Van Alstyne, 'Platform Mergers and Antitrust' (2021) 30 *Industrial and Corporate Change* 1307, 1312.

[10] Competition & Markets Authority, *Meta/Giphy* (ME/6891/20-II, 6 December 2021); confirmed on substance in *Meta/Giphy*, [2022] CAT 26, 14 June 2022; Competition & Markets Authority, *Microsoft/Activision Blizzard* (26 April 2023).

[11] Viktoria H.S.E. Robertson, *Merger Review in Digital and Technology Markets: Insights from National Case Law* (Report to the European Commission, 2022). The present contribution is, in parts, based on the expert report I submitted to the European Commission and on my remarks at the First Annual Conference of the European Commission Legal Service of 17 March 2023, the latter forthcoming in the European Competition Law Review.

competition authorities and courts need to go beyond such 'traditional' theories of harm in order to do justice to the specificities of digital markets. This endeavour, however, can only be successful if the standard of proof engrained in competition law can be fulfilled to the required level.

7. By way of a **conclusion**, section 5 highlights next steps that competition authorities, courts and legislators can take in order to keep up with developments in digital mergers.

2. Growing Concentration in Digital Platform Markets and Related Competition Concerns

8. Many digital markets exhibit characteristics that favour market concentration, such as 'winner takes all' competition, direct and indirect network effects, market tipping and the lock-in of users.[12] In addition to this 'natural' market concentration, however, Big Tech companies have made nearly 900 acquisitions over the past two decades.[13] While some have referred to this M&A activity as 'killer acquisitions',[14] these acquisitions often do not lead to the killing-off of innovation but rather to the incorporation of said innovation into the acquiring company – possibly as part of the platform's existing service offerings.[15] These types of 'conglomerate' Big Tech acquisitions have been a factor in the emergence of entire digital ecosystems.[16]

9. Several big digital platforms have morphed into digital ecosystems that offer a multitude of interoperable digital goods and services, lead to platform envelopment[17] and shield the ecosystem from interoperability with third-party services as far as possible.[18] This leads to a number of competition concerns. For instance, digital ecosystems may erect barriers to competition that cannot be overcome by competitors that only offer a smaller

[12] Jason Furman et al., *Unlocking Digital Competition – Report of the Digital Competition Expert Panel* (2019); Jacques Crémer, Alexandre de Montjoye and Heike Schweitzer, *Competition Policy for the Digital Era* (Report to the European Commission, 2019).

[13] Parker, Petropoulos and Van Alstyne (n 9) 1312.

[14] This term was coined in relation to acquisitions in pharmaceuticals by Colleen Cunningham, Florian Ederer & Song Ma, 'Killer Acquisitions' (2021) 129 *Journal of Political Economy* 649. It has since been widely used in the antitrust discussion of digital markets.

[15] See Axel Gautier and Joe Lamesch, 'Mergers in the Digital Economy' (2021) 54 *Information Economics and Policy*, Article 100890; Pauline Affeldt and Reinhold Kesler, 'Big Tech Acquisitions – Towards Empirical Evidence' (2021) 12 *Journal of European Competition Law & Practice* 471; Laureen de Barsy, 'Big Tech Acquisitions and Innovation' (24 March 2023, MaCCI conference 2023).

[16] Eg, see Marc Bourreau and Alexandre de Streel, *Digital Conglomerates and EU Competition Policy* (CERRE Report, March 2019); Anne C. Witt, 'Who's Afraid of Conglomerate Mergers' (2022) 67 *Antitrust Bulletin* 208; Robertson (n 11).

[17] On platform envelopment, see Thomas Eisenmann, Geoffrey Parker and Marshall Van Alstyne, 'Platform Envelopment' (2011) 32 *Strategic Management Journal* 1270.

[18] On digital ecosystems and their relevance for competition law, see already Amelia Fletcher, 'Digital competition policy: Are ecosystems different?' DAF/COMP/WD(2020)96; Marc Bourreau, 'Some Economics of Digital Ecosystems' DAF/COMP/WD(2020)89; Michael G. Jacobides and Ioannis Lianos, 'Ecosystems and Competition Law in Theory and Practice' *CLES Research Paper* No. 1/2021.

range of digital goods and services.[19] Furthermore, the data that big digital platforms can collect represents an unmatched competitive advantage where competitors are not able to replicate the data sets, an issue that becomes particularly pressing because of the versatile nature of data that the incumbent platform can use in many different ways and markets.[20]

10. While competition concerns arise in the face of the growing concentration in digital platform markets, it is not always possible to establish a competition authority's jurisdiction to review a digital merger.

3. Establishing Jurisdiction over Digital Mergers

11. In order to allow a competition authority to assess a digital merger, the legislator needs to ensure that the authority can establish jurisdiction over those acquisitions that it deems important enough to be assessed by the competition authority. One challenge in this respect lies in the fact that many merger control regimes rely on turnover thresholds that digital start-ups simply do not reach. However, alternative jurisdictional thresholds have also been introduced, such as a transaction value threshold or a market share threshold. In the European Union, the Digital Markets Act opens up an additional avenue for establishing jurisdiction over Big Tech acquisitions, as discussed below.

3.1. Turnover Thresholds

12. Many jurisdictions rely on the turnover generated by the merging parties in order to decide whether or not a merger is regarded as significant enough to warrant a competitive assessment by the competent competition authority. This, for instance, is the case under the EU Merger Regulation, where both the acquirer and the target's turnover need to reach certain thresholds.[21] In the UK, one of the jurisdictional tests relies on the target's turnover alone.[22] In the digital sphere, however, the target regularly is a small start-up that may be very innovative and seen as credible competition by Big Tech, but may not yet generate noteworthy turnover. A transaction whereby a Big Tech company buys such a promising start-up may therefore not be reviewable by a competition authority that can only establish jurisdiction based on such a turnover threshold.

3.2. Transaction Value Thresholds

13. Some jurisdictions have reacted to the shortcomings of the traditional turnover thresholds by introducing transaction value thresholds in addition to their national turnover thresholds. Whenever an acquirer pays a considerable amount of money for a target, this acquisition is seen as relevant for competition and it needs to be notified to the competent competition authority.

[19] This issue of the contestability of markets is addressed by the European Union's Digital Markets Act; see Articles 5, 6 and 7 DMA.

[20] On the possibility of synthetic data remedying this imbalance, see Michal Gal and Orla Lynskey, 'Synthetic Data: Legal Implications of the Data-Generation Revolution' (2023) 109 *Iowa Law Review* (forthcoming).

[21] Article 1 paras 2 and 3 EUMR, in connection with Article 21 EUMR.

[22] Section 23 para 2 Enterprise Act 2002, as amended.

14. Both Austria and Germany introduced such transaction value thresholds in 2017, with the transaction value triggering a notification obligation set at €200m in Austria[23] and at €400m in Germany.[24] The Austrian and German competition authorities also issued joint guidance on their transaction value thresholds, most recently updated in January 2022.[25]

3.3. Market Share Thresholds or Share of Supply Tests

15. A further way to take into account the respective competitive weight of a target despite a lack of significant turnover is a market share threshold or a share of supply test. Some jurisdictions have therefore opted for this type of jurisdictional threshold.

16. Spain, for instance, relies on a market share threshold in addition to the traditional turnover threshold. This allows the national competition authority to review a big player's acquisition of a small but successful target in a niche market. The Spanish market share threshold is set at 30%, unless the target has a turnover not exceeding €10 million, in which case the market share threshold is set at 50%.[26]

17. In the UK, the national competition authority can review a merger where, post-merger, the merged entity would supply at least 25% of a particular good or service in the UK or a substantial part of it, and where the merger would also lead to an increment in this share of supply ('share of supply test').[27]

3.4. Referrals Establishing the European Commission's Jurisdiction

18. At the level of the European Union, the jurisdictional thresholds in the EU Merger Regulation (EUMR) require a turnover on the side of both the acquiring and the target company, meaning that the acquisition of relatively small start-ups will regularly not establish the European Commission's jurisdiction. This is now 'remedied' by the interplay of Article 22 EUMR and the Digital Markets Act. Under Article 22 EUMR, a national competition authority can refer a merger to the European Commission where it believes said merger to have a European dimension, and where this merger may significantly affect competition. Once the Commission accepts the referral, it becomes competent to review it for those countries whose authorities joined the referral.[28] The European Commission was long reluctant to accept referrals under Article 22 EUMR if the referring national competition authority did not itself have jurisdiction to review said merger, but it recently changed its approach against the background of rising concerns in both pharmaceuticals and digital markets. In guidance from 2021, the Commission states that it may now

[23] § 9 para 4 Cartel Act, Austrian Federal Law Gazette I 61/2005 as amended.

[24] § 35 para 1a Act against Restraints of Competition, German Federal Law Gazette I 2013/1750 as amended.

[25] Bundeswettbewerbsbehörde and Bundeskartellamt, Leitfaden Transaktionswert-Schwellen für die Anmeldepflicht von Zusammenschlussvorhaben (§ 35 Abs. 1a GWB und § 9 Abs. 4 KartG) (January 2022).

[26] Article 8 para 1 lit a Law 15/2007 of 3 July on the Defence of Competition, Spanish Official State Gazette No. 159/2007, as amended.

[27] Section 23 para 3 Enterprise Act 2002, as amended. This test also applies where the merged entity would acquire at least 25% of a certain good or service.

[28] Article 22 para 3 EUMR.

increasingly accept such referrals from national competition authorities.[29] This new approach on the part of the Commission was confirmed by the General Court in *Illumina/Grail*[30] and is currently on appeal before the Court of Justice.[31]

19. Where a Big Tech acquisition does not reach the turnover thresholds at European or national level, and is not caught by either a transaction value threshold or a market share threshold, the question remains how national competition authorities ought to obtain knowledge of a merger that may nevertheless significantly affect competition in Europe. Here, the Digital Markets Act introduces a novelty: Big Tech companies that have been designated as gatekeepers need to inform the Commission of any planned acquisition before carrying it out, under Article 14 Digital Markets Act. In turn, the Commission then informs national competition authorities of this.[32] Under Article 22 EUMR, the national competition authority can then refer said merger to the Commission.[33]

20. While this is not the place to discuss Article 22 EUMR referrals in detail,[34] it should nevertheless be pointed out that this mechanism can lead to a duplication of merger procedures where one group of national competition authorities refers a merger to the European Commission, while another does not join said referral. This occurred in the 2022 case of *Meta/Kustomer*.[35] Such occurrences can weaken the one-stop-shop principle enshrined in the EU Merger Regulation[36] and challenge consistency among merger reviews in the EU more generally.[37]

4. Adapting Merger Theories of Harm to Digital Market Environments

21. While there is no doubt that the first step towards an appropriate scrutiny of digital mergers lies in establishing jurisdiction over those mergers, be it at a supranational or at a national level, a second step must necessarily follow on its heels: the application of theories of harm that are adapted to digital market environments.

22. As I have found in recent research, traditional theories of harm continue to take centre stage in digital merger cases, at least when one considers national merger decisions at the level of the EU Member States and the United Kingdom. In the following, I provide an overview of quantitative insights from an analysis of recent digital and technology

[29] European Commission, Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases (Article 22 Guidance) [2021] OJ C113/1, para 9.

[30] Case T-227/21, *Illumina-Grail/Commission*, ECLI:EU:T:2022:447.

[31] Case C-611/22 P, *Illumina-Grail/Commission*, appeal pending.

[32] Article 14 para 4 DMA.

[33] Under Article 22 para 5 EUMR, the Commission may also invite other national competition authorities to join this referral.

[34] But see my remarks at the First Annual Conference of the European Commission Legal Service of 17 March 2023, forthcoming in the European Competition Law Review.

[35] European Commission Decision of 27 January 2022, M.10262 – *Meta/Kustomer*; Bundeskartellamt**,** *Meta/Kustomer* (B6-37/21, 9 December 2021).

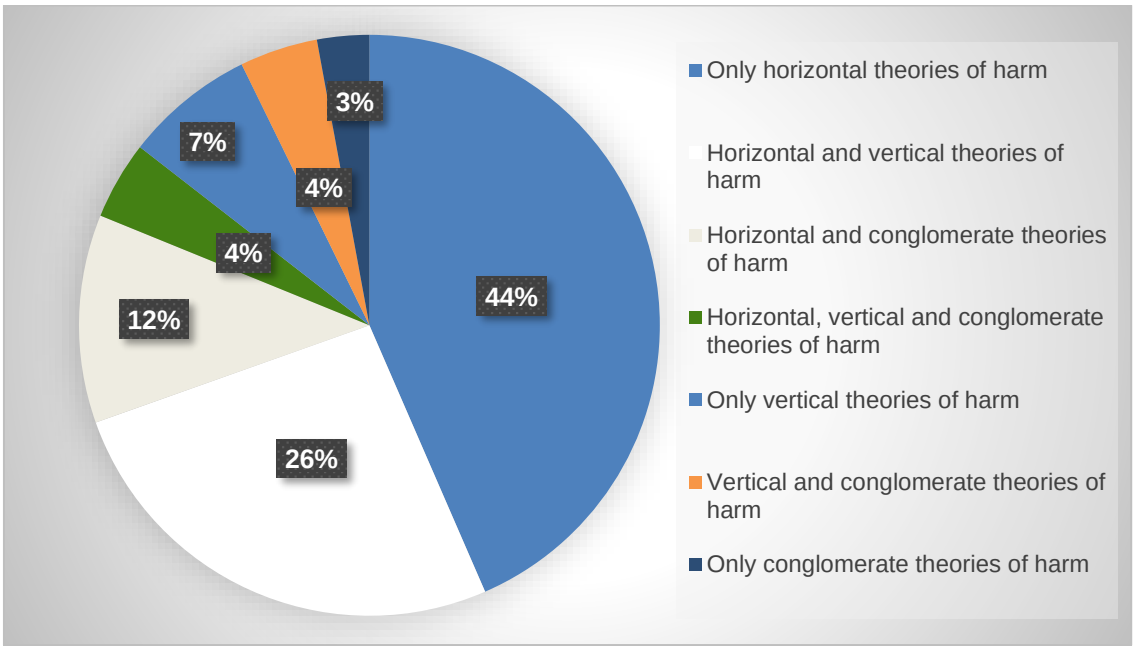
[36] See Article 21 EUMR.

[37] On this, see already my recent contribution at the European Commission Legal Service conference (17 March 2023).

merger practice in 16 EU Member States and the UK, for which I identified 69 national merger cases in digital and technology-related markets.[38] To this, I have added insights from follow-on research that I conducted after conclusion of that analysis. For each category of competitive concerns, ie horizontal, vertical and conglomerate, I show the results of my quantitative analysis on theories of harm. This is then followed by a closer look at six case studies that highlight some major trends in the application of specific theories of harm in digital merger cases. This shows not only the types of concerns that competition authorities identified when confronted with a merger case in a digital market environment, but also how traditional theories of harm have been adapted to these market environments – and what further development is required to fully address competition concerns in digital mergers.

23. Overall, the data shows that in digital markets, horizontal theories of harm continue to be the focus of the substantive merger assessment, although conglomerate theories of harm are on the rise. In my study of 69 national European merger cases, 44% of cases studied exclusively relied on horizontal theories of harm. By comparison, 7% of cases only relied on vertical theories of harm and 3% of cases only concerned conglomerate theories of harm. When a case looked at two theories of harm, then this was usually a combination of horizontal and vertical theories of harm (26% of cases). Only a small percentage, namely 4% of cases, looked at all three theories of harm.

Figure 1. 69 digital & technology merger cases, by theories of harm



Source: Robertson 2022)[39]

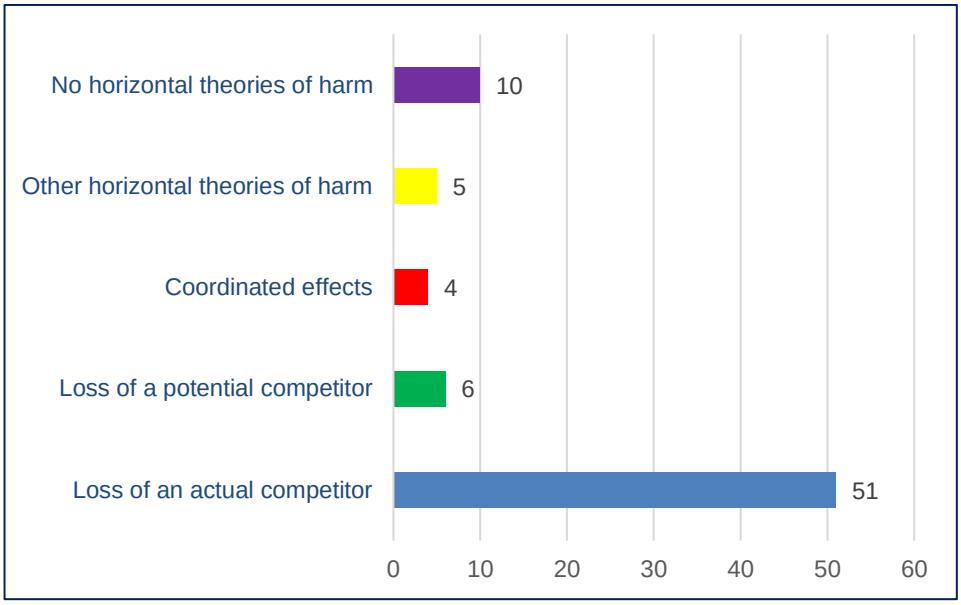
[38] The data relied on here is based on research I conducted for the European Commission in 2022; see Robertson (n 11). For an in-depth discussion of the methodology, quantitative and qualitative findings, as well as a summary of all cases analysed for this study, please see the Report.

[39] Robertson (n 11) 30.

4.1. Horizontal Theories of Harm in Digital Mergers

24. Horizontal theories of harm are assessed in concentrations that involve companies that are active on the same relevant market, ie where the merging parties are actual or at least potential competitors.[40] Horizontal theories of harm remain the main competitive concern that is assessed in digital merger cases. Only 10 out of 69 cases did not relate to any horizontal theories of harm. In most cases, namely 51 out of 69, the loss of an actual competitor was among the theories of harm that was focused on. 9 of these mergers were cleared subject to conditions, a further 4 were prohibited and one was withdrawn by the parties. Only 6 cases (also) related to the loss of a potential competitor, and of these 5 came from the United Kingdom. 4 cases related to coordinated effects, and a further 5 concerned other horizontal theories of harm.[41]

Figure 2. Distribution of horizontal theories of harm in 69 European digital & technology merger cases



Source: Robertson 2022[42]

25. In the following, two sets of case studies highlight how horizontal theories of harm have been applied in digital merger cases. The first shows how the same digital merger can require a different assessment in different jurisdictions based on the success of individual digital platforms in the jurisdictions at issue and, for instance, the presence of a locally successful platform. The second case study highlights the various ways in which horizontal competition concerns have been dispelled in digital merger cases based on particular market characteristics.

[40] 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.

[41] Robertson (n 11) 46.

[42] Robertson (n 11) 31.

4.1.1. Case Study 1: Same Digital Merger – Different Assessments in Different Jurisdictions

26. In 2020/2021, the *eBay/Adevinta* concentration was reviewed in parallel in Austria, Germany and the UK.[43] Through the proposed deal, Adevinta was to acquire the eBay Classifieds Group (eCG) from eBay, while eBay would acquire a third of the voting rights and 44% of the financial shares in Adevinta. In Austria, Adevinta held a 50% interest and exercised joint control over the leading Austrian online classifieds portal, willhaben.at. Adevinta had also (until 6 February 2021) been present in Austria through its online classifieds portal shpock.at. In the UK, Adevinta provided online classified advertising services (Shpock; MB Diffusion). eBay operated its online marketplace in all countries concerned. In the UK, eCG also provided online classified advertising services (Gumtree; motors.co.uk). The proposed concentration affected the markets for the supply of online generalist classified advertising services, for the supply of online classified advertising platforms, consumer-to-consumer online marketplaces and online marketplaces for motor vehicles, among others.

27. While the concentration was unconditionally cleared in Germany in November 2020,[44] both the Austrian Federal Competition Authority and the UK Competition & Markets Authority raised concerns related to horizontal theories of harm that the parties addressed through commitments. The Austrian authority's concern was based on the fact that eBay's online marketplace was a close competitor of the Austrian marketplace willhaben.at, especially in respect of consumer-to-consumer transactions. This was confirmed through market surveys and internal documents of the parties. This market already being concentrated, there was a considerable risk of non-coordinated effects. A range of structural and behavioural commitments was required to allow for the conditional clearance of this concentration in Austria.[45]

28. The UK authority was concerned that the concentration would lead to a substantial lessening of competition due to horizontal unilateral effects, leading to reduced choice and innovation as well as higher fees. eBay Marketplace was the largest platform on the market, over twice the size of its next biggest competitor, 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. Under eBay's ownership, Gumtree had not competed as aggressively as it could have. The authority reasoned that part of eBay's motivation to sell Gumtree to Adevinta consisted in eBay continuing to exercise some influence on that platform. A range of structural commitments, including the sale of Gumtree and Shpock, was required to allow for the conditional clearance of this concentration in the UK.[46]

[43] Bundeswettbewerbsbehörde, *eBay/Adevinta* (BWB/Z-5141, Z-5142, Z-5420 and Z-5421, 18 June 2021); Bundeskartellamt, *Adevinta/eBay Classifieds Group* (B6-41/20, 23 November 2020); Competition & Markets Authority, *Adevinta/eBay Classifieds Group* (ME/6897/20, 16 February 2021). On this, see Robertson (n 11) 39, 43.

[44] Bundeskartellamt, *Adevinta/eBay Classifieds Group* (B6-41/20, 23 November 2020).

[45] Bundeswettbewerbsbehörde, *eBay/Adevinta* (BWB/Z-5141, Z-5142, Z-5420 and Z-5421, 18 June 2021).

[46] Competition & Markets Authority, *Adevinta/eBay Classifieds Group* (ME/6897/20, 16 February 2021).

4.1.2. Case Study 2: Assuaging Horizontal Competition Concerns in Digital Mergers

29. In a range of digital merger cases, competition authorities found that their competition concerns related to horizontal theories of harm could be dispelled because of factors that directly related to the specific characteristics of digital markets.

30. In a first set of cases, competition authorities repeatedly found that where a non-Big Tech company proposed an acquisition, the presence of a Big Tech company – such as Alphabet, Amazon, Apple, Meta or Microsoft – on that market could mitigate its competition concerns.[47] In *Axel Springer/Concept Multimédia*, for instance, the French Autorité de la concurrence did not expect any anti-competitive effects on the market for online advertising to arise because of the combined strength of Google and Facebook with a market share above 65%.[48] Similar considerations have been made in relation to possible conglomerate effects. In *TF1/Aufeminin*, the French authority considered that even if the merging parties engaged in a bundling of online and television advertising space, the strong presence of Google and Facebook on the market for online advertising would mitigate any conglomerate effects.[49]

31. In a joint venture on the creation of an e-commerce platform that also affected the market for online advertising, the Portuguese Autoridade da Concorrência equally considered the strong presence of Google and Facebook on that market as a countervailing factor.[50] Such considerations were also mentioned in the Dutch Autoriteit Consument & Markt's analysis of the merger in *DPG/Sanoma*[51] and in the Irish Competition and Consumer Protection Commission case of *Booster/Liftoff Mobile*.[52] In the horizontal merger of *Turnitin/Ouriginal Group*, the Spanish Comisión Nacional de los Mercados y la Competencia considered the recent market entry of Google and Microsoft in plagiarism software solutions as credible competitive pressure on the merging entity.[53]

32. The characteristics of digital markets have also been carefully taken into account in merger reviews.[54] Sometimes, competition authorities welcomed a merger because it represented a possibility for preventing the market from tipping. In its assessment of the *Axel Springer/Immowelt* acquisition, the German Bundeskartellamt held the transaction to be pro-competitive, as it would lead to the merging of the second- and third-largest online real estate platforms in Germany and thereby ensure that the market would not tip in the face of the market leader's overbearing market power.[55] Furthermore, where users or

[47] On this, see Robertson (n 11) 42.

[48] 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).

[49] Autorité de la concurrence, *TF1/Aufeminin* (18-DCC-63, 23 April 2018).

[50] Autoridade da Concorrência, *Sonae/CTT - Correios de Portugal JV* (Ccent. 27/2018, 19 July 2018).

[51] Autoriteit Consument & Markt, *DPG/Sanoma* (ACM/19/038207, 10 April 2020).

[52] Competition and Consumer Protection Commission, *Booster/Liftoff Mobile* (M/21/002, 15 February 2021).

[53] Comisión Nacional de los Mercados y la Competencia, *Turnitin/Ouriginal Group* (C/1220/21, 19 October 2021).

[54] On this, see Robertson (n 11) 41 f.

[55] Bundeskartellamt, *Axel Springer/Immowelt* (B6-39/15, 20 April 2015).

customers were known to multi-home, competition authorities saw this as a countervailing factor against tipping.[56] In a further case, the German authority assessed the particular multi-homing behaviour of users on the market at issue, namely online dating portals. It found that in this type of market, network effects were less pronounced because users usually multi-homed and would not be locked-in to the service if the dating portal was indeed successful in finding users a partner. This could dispel competition concerns.[57] Multi-homing was also regarded as an important feature to maintain competition on the market in online food delivery platforms, leading the Romanian Consiliul Concurenței only to approve the *Glovoappro/Foodpanda* merger subject to commitments relating to non-exclusivity that would maintain users' possibility to multi-home.[58]

4.1.3. Discussion

33. Horizontal theories of harm remain the focus of most digital mergers. In their application of these theories of harm, however, competition authorities have already considerably adapted them to the particular market characteristics of digital platform markets.

34. The *eBay/Adevinta* cases clearly show that whenever the same concentration is reviewed in multiple jurisdictions, the analysis and outcome very much depend on the particular dynamics on the relevant market(s) concerned. In the case at hand, one competition authority had no competition concerns, while two raised concerns but required different remedies based on the market conditions prevailing on the respective geographic markets. Although many digital platforms transcend traditional geographic boundaries, one should not neglect the fact that some digital platforms may have a limited geographic reach, or may be more successful in some jurisdictions than in others. These differences need to be accounted for both in the substantive analysis that the competition authorities conduct, and in the commitments they can accept.

35. On the other hand, the market characteristics of digital markets – including tipping and resulting market concentration, network effects, multi-homing and lock-in – have repeatedly been at the centre of attention in the substantive assessment of horizontal theories of harm with considerable impact on the outcome of the case. In that sense, traditional theories of harm have taken insights from the economics of platforms into account. An aspect that could perhaps still be more prominently incorporated is a more long-term view of how digital markets could develop post-merger.

4.2. Vertical Theories of Harm in Digital Mergers

36. Vertical theories of harm are assessed when a concentration involves companies that are active at different levels of the economy, ie where there is a vertical business relationship between them.[59] A majority of the merger cases studied – namely 40 out of 69 – did not relate to any vertical theory of harm. The vertical theory of harm that competition

[56] Eg, see Bundeskartellamt, *Axel Springer/Immowelt* (B6-39/15, 20 April 2015).

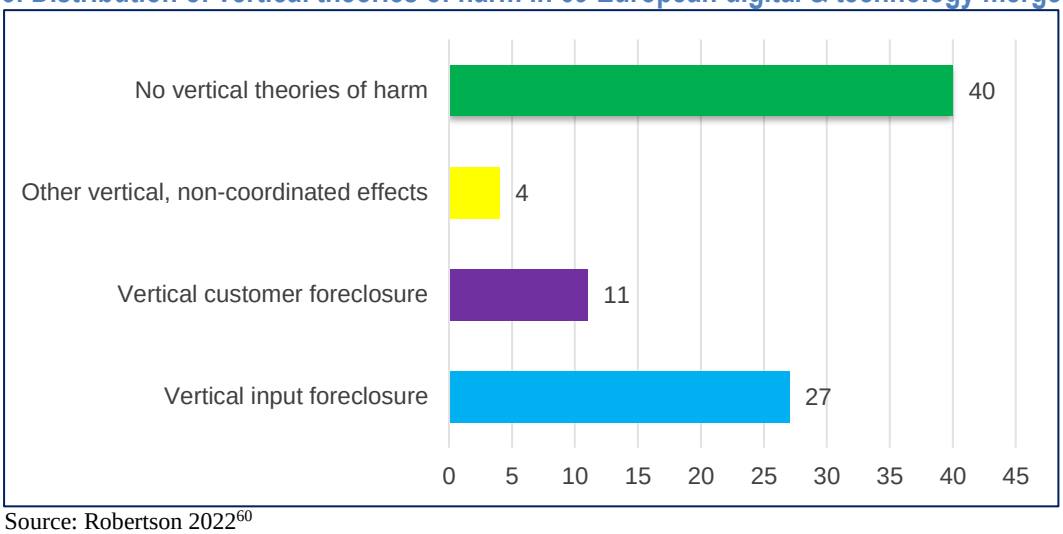
[57] Bundeskartellamt, *OCPE II Master (Parship)/EliteMedianet* (B6-57/15, 22 October 2015).

[58] România Consiliul Concurenței, *Glovoappro/Foodpanda* (86/22.11.2021, 22 November 2021).

[59] 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.

authorities assessed most often concerned input foreclosure, which was addressed in 27 merger cases.

Figure 3. Distribution of vertical theories of harm in 69 European digital & technology merger cases



Source: Robertson 2022[60]

37. In the following, two sets of case studies highlight how vertical theories of harm have been applied in digital merger cases. The first shows how the same digital merger was analysed in very similar ways in two jurisdictions, only to result in two different kinds of remedies. The second case study focuses on how access to data that a vertical merger may give rise to has been included in merger assessments, as this data access is regularly regarded as a competitive advantage for the merging firm.

4.2.1. Case Study 3: Input Foreclosure in the Meta/Giphy Case

38. To assess whether input foreclosure is a credible theory of harm, competition authorities need the determine whether the merged entity has the (i) ability and (ii) incentive to engage in foreclosure behaviour, and (iii) what the effects of such behaviour would be on competition downstream.[61] Together with horizontal concerns related to potential competition,[62] input foreclosure was the primary competition concern assessed in the *Meta/Giphy* case, which was reviewed in parallel in the UK and in Austria in 2021/2022 – with diverging outcomes.[63] Meta is a technology company that owns social networks like Facebook and Instagram as well as messenger service WhatsApp. Giphy provides a GIF library, with GIFs being animated or static images that users of social media platforms and messenger services heavily rely on. In the UK, vertical input foreclosure was one of the theories of harm that led the Competition & Markets Authority to request a divestiture in *Meta/Giphy* in 2021. The authority found that post-merger, Meta could foreclose

[60] Robertson (n 11) 32.

[61] European Commission, Non-horizontal Merger Guidelines 2008, para 32; Competition & Markets Authority, Merger Assessment Guidelines (CMA129, 18 March 2021) para 7.10.

[62] On these, see Robertson (n 11) 47.

[63] Competition & Markets Authority, *Meta/Giphy* (ME/6891/20-II, 6 December 2021); *Meta/Giphy*, [2022] CAT 26, 14 June 2022; 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*. On these cases, see Robertson (n 11) 55.

competitors in the market of social media services by preventing their access to Giphy's GIFs. Google's Tenor was the only comparable service to Giphy. The authority concluded that Meta would also have an incentive to engage in this input foreclosure, as users wanting to use Giphy's popular GIF library may be incentivised to switch to one of Meta's platforms in order to do so. Network effects specific to these market environments would further amplify this effect, ultimately strengthening Meta's overall market power in social media and negatively affecting competition. As the platform markets concerned were highly dynamic and interconnected, a lessening of competition on one market (ie, the supply of social media services) could easily exacerbate anti-competitive effects on another (ie, the supply of display advertising). The UK authority did not regard the commitments that Meta offered as sufficient to address this concern; Meta was ordered to fully divest Giphy, which it had already acquired.[64]

39. In the Austrian review of the same merger, the Austrian Bundeswettbewerbsbehörde emphasised that the acquisition may restrict non-discriminatory access to Giphy for other online services. When the authority requested a review of the merger before the Cartel Court and, subsequently, the Supreme Cartel Court, the courts considered that conditional clearance could be given to the acquisition. To obtain this clearance, Meta committed to provide non-discriminatory access to Giphy's GIF library for competing social media providers for a duration of five years. Furthermore, it committed to grant alternative GIF libraries access to Giphy's GIF library via application programming interfaces for a duration of seven years, thereby allowing for the establishment of an additional GIF provider.[65]

4.2.2. Case Study 4: Access to Data Through Vertical Integration

40. A competition concern that frequently surfaces in digital mergers is related to the access to data that an acquisition can open up and that may represent a unique competitive advantage in this particular market environment. This concern regularly arises in the case of vertical integration, but can also arise in horizontal and conglomerate digital mergers. While data is a valuable resource in any market, the ecosystem nature of many digital service providers means that, due to the versatility of data, data from one market may be enormously useful in a wide range of related or indeed unrelated markets – a gamechanger. This can create efficiencies, but also raise competition concerns where competitors are not or no longer able to access certain data sets they need to provide their own goods or services.

41. This type of vertical unilateral effect was indeed at issue in a number of cases. In *Rockaway Capital/Heureka*, the Czech Úřad pro ochranu hospodářské soutěže was concerned that once private equity company Rockaway Capital acquired control of comparison shopping website heureka.cz, Rockaway's online shops could collect excessive amounts of data about their users that could then be used in the interest of Rockaway's businesses.[66] This concern was addressed in the commitments offered by Rockaway.

42. In the case of *Sully System/CENEJE*, Sully System was active in the online retail market for non-food consumer goods and wanted to acquire Ceneje, a company active in

[64] Competition & Markets Authority, *Meta/Giphy* (ME/6891/20-II, 6 December 2021). This was confirmed on substance in *Meta/Giphy*, [2022] CAT 26, 14 June 2022.

[65] 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*.

[66] Úřad pro ochranu hospodářské soutěže, *Rockaway Capital/Heureka* (ÚOHS-S0013/2016/KS-21123/2016/840/DVá, 16 May 2016).

online advertising through search engines and online price comparison. These markets were vertically linked. When assessing input foreclosure, the Slovenian Javna agencija Republike Slovenije za varstvo konkurence raised the concern that the acquisition could provide Sully System with access to commercially sensitive information regarding competitors' activities in the downstream market, and only cleared it subject to conditions.[67]

43. In *Sanoma/Iddink*, Sanoma was a publisher of (digital) learning materials and wanted to acquire Iddink, a distributor of (digital) learning materials and electronic learning environments in secondary education. The Dutch Autoriteit Consument & Markt considered it plausible that the merged entity would have access to commercially sensitive information about competitors after the proposed concentration, giving it an advantage over its competitors and possibly impeding competition in the market for teaching materials in secondary education. The acquisition was cleared subject to conditions.[68]

44. In *Uber International/GPC Computer Software*, the UK's Consumer & Markets Authority assessed a number of horizontal and vertical theories of harm in this acquisition of GPC Computer Software by ride-hailing service Uber. GPC Computer Software developed booking and dispatch technology and also operated the iGo network, connecting demand for taxi trips with their supply. The UK authority assessed whether the acquisition would give Uber access to commercially sensitive information about competitors that would allow it to compete more aggressively. Ultimately, the authority concluded 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.[69]

45. Similarly, in *esure/Gocompare.com*, the UK's Consumer & Markets Authority considered whether the acquirer could access commercially sensitive information through Gocompare's price comparison website, allowing it to either increase its margins or gain a competitive advantage, for instance enabling it to back-estimate competitors' pricing algorithms or increase prices. The authority did not regard this as a credible theory of harm in this particular case.[70]

4.2.3. Discussion

46. Vertical theories of harm appear to be of lesser concern than horizontal theories of harm in digital mergers, but are nevertheless assessed in over 40% of all cases. Due to the ecosystem nature of many digital markets, vertical and conglomerate effects will need to be more closely focused on in digital market environments.

47. The *Meta/Giphy* case shows how very similar substantive competition concerns related to one and the same case can result in different remedies being regarded as appropriate.[71] While the parallel existence of merger control regimes allows for such

[67] Javna agencija Republike Slovenije za varstvo konkurence, *Sully System/CENEJE* (3061-27/2017-71, 12 April 2018).

[68] Autoriteit Consument & Markt, *Sanoma/Iddink* (ACM/19/035555, 28 August 2019).

[69] Competition & Markets Authority, *Uber International/GPC Computer Software* (ME/6903/20, 29 March 2021).

[70] Competition & Markets Authority, *esure Group/Gocompare.com* (ME/6495-14, 23 February 2015).

[71] Robertson (n 11) 47 f.

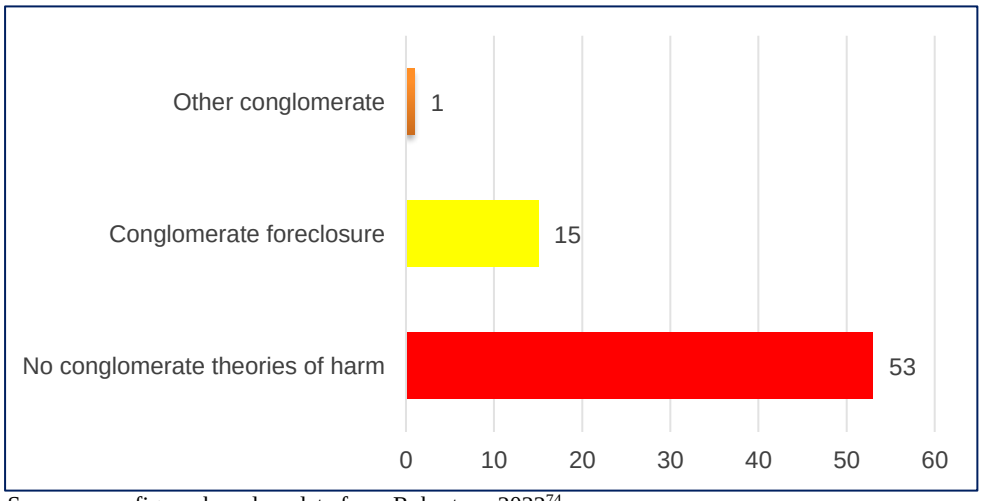
inconsistencies to arise, the fact that they arise points towards a need to develop a more harmonious approach to mergers that, by their nature, are reviewable in multiple jurisdictions. This is not specific to digital markets,[72] but due to many digital platforms' transnational activity, it is of particular urgency in digital cases. This is not only of relevance to the substantive assessment, but also when formulating appropriate remedies that should address and – in fact – remedy a specific competition concern (here: input foreclosure together with potential competition concerns).

48. The data-related competitive advantage that an acquirer can obtain through a vertical digital merger has been assessed in a wide range of cases, often from the perspective of vertical competition concerns. The analysis, of course, is very case-specific, ranging from regarding the merged entity's enhanced data access as a possibly pro-competitive feature to requiring commitments in order to address this particular concern. What matters in this regard is for competition authorities to approach these cases with a thorough understanding of the practicalities and importance of data access in digital markets, and the competition dynamics in those markets, in order to enable the authorities to fully appreciate the competition effects of said data access.

4.3. Conglomerate Theories of Harm in Digital Mergers

49. Conglomerate theories of harm are assessed in situations in which the merging parties' business is neither horizontally nor vertically connected, but in which anti-competitive effects may nevertheless arise.[73] Only 16 out of 69 cases assessed this type of theory of harm in the mergers studied.

Figure 4. Distribution of conglomerate theories of harm in 69 European digital & technology merger cases



Source: own figure, based on data from Robertson 2022[74]

[72] For instance, see European Commission, *Boeing/McDonnell Douglas*, Case IV/M.877, 1997 OJ L/336; Federal Trade Commission, *Boeing/McDonnell Douglas*, FTC File Nr 971 0051 (1 July 1997).

[73] European Commission, Non-horizontal Merger Guidelines 2008, para 5.

[74] Robertson (n 11) 115 ff.

50. In the following, two sets of case studies show how conglomerate theories of harm have been applied in digital merger cases. The first relates to bundling strategies, as these are the most common conglomerate concern raised in digital mergers. The second case study zooms in on a Greek case involving food delivery platforms that was one of only two mergers in which conglomerate theories of harm were the only theory of harm addressed by the authority.

4.3.1. Case Study 5: Bundling Strategies

51. Through post-merger bundling strategies, a merged entity may be able to combine the sale of goods and services that, pre-merger, were sold separately. To assess whether tying or bundling strategies represent a credible conglomerate theory of harm in a case, a competition authority needs to determine the merged entity's (a) ability and (b) incentive to engage in such behaviour, as well as (c) the tying or bundling's effects on competition.[75] While tying and bundling can constitute an advantage for some customers, it may also foreclose the market for competitors that cannot compete with the bundle.

52. In digital mergers, bundling strategies have been looked at as possible conglomerate effects. Regularly, however, possible post-merger bundling was not regarded as a credible threat to competition. In *Axel Springer/Concept Multimédia*, the French Autorité de la concurrence considered that an online/offline bundle of real estate classified ads would do no harm to competition, as the offline market's importance was in decline.[76] In a further French case, the authority found that offering a bundle of online and television advertising space seemed to be one of the objectives of the acquisition. However, the merged entity's share of the market for online advertising would be below 10%, its competitors on that market – including Big Tech – had strong market positions, and barriers to entry were low, meaning that this theory of harm was not credible.[77]

53. In *Sanoma/Iddink*, the Dutch Autoriteit Consument & Markt found that a bundle between Sanoma's digital learning materials and Iddink's distribution of such learning materials and the provision of electronic learning environments would not be profitable and therefore not a credible theory of harm.[78]

54. In *Blackbaud/Giving*, the UK's Competition & Markets Authority assessed a merger between two online fundraising platforms (OFPs), in which the acquirer also provided payment services and customer relationship management (CRM) software. When confronted with a possible post-merger bundling strategy of the merged entity's CRM and OFP offerings, the authority found that customers usually did not buy these services at the same time and that Blackbaud had already unsuccessfully tried to implement such a strategy. Furthermore, the authority actually regarded such a discounted bundle as possibly pro-competitive as long as CRM competitors were not forced out of the market.[79]

[75] European Commission, Non-horizontal Merger Guidelines 2008, para 94; Competition & Markets Authority, Merger Assessment Guidelines 2021, para 7.32.

[76] Autorité de la concurrence, *Axel Springer/Concept Multimédia* (18-DCC-18, 1 February 2018).

[77] Autorité de la concurrence, *TF1/Aufeminin* (18-DCC-63, 23 April 2018).

[78] Autoriteit Consument & Markt, *Sanoma/Iddink* (ACM/19/035555, 28 August 2019).

[79] Competition & Markets Authority, *Blackbaud/Giving* (ME/6700/17, 8 September 2017).

4.3.2. Case Study 6: Are Conglomerate Theories of Harm Enough? Lessons From the Greek Delivery Hero Case

55. The Greek *Delivery Hero* case of 2022 is one of the very few cases in which a digital merger was assessed purely in relation to conglomerate competition concerns, and subsequently only cleared subject to conditions.[80] Delivery Hero operated e-food, Greece's leading online food delivery platform. Through the proposed concentration, Delivery Hero intended to make a number of acquisitions, namely of Alfa Distributions (wholesale supply of consumer goods to supermarkets), Inkat (wholesale supply of groceries, retail grocery store chain), Delivery.gr (online intermediation services for restaurants, supermarkets, convenience stores and other local stores), and E-table (online intermediation services for restaurant reservations). Both E-table and Delivery Hero were found to have significant market power in their respective Greek markets. The Hellenic Competition Commission (Επιτροπή Ανταγωνισμού) exclusively based its analysis on conglomerate theories of harm. It considered that Delivery Hero's combination of its own online food delivery platform (e-food) with the targets' various online intermediation services would give rise to conglomerate effects. In particular, the merged entity would have the ability and incentive to bundle their various services for business users, thereby leveraging its market power. Also, combining data sets from various services would enable the merged entity to run targeted advertisements that no competitor could effectively compete with. These conglomerate concerns were all addressed in the commitments.[81]

4.3.3. Discussion

56. Conglomerate theories of harm are only considered in roughly every fifth digital merger case. Nevertheless, they appear to be on the rise. In a range of digital merger cases, bundling strategies involving complementary products were assessed. They were found to be either possible but also possibly pro-competitive, or not to be a viable business strategy. In this regard, it seems that this focus on post-merger bundling has so far eclipsed other possible conglomerate theories of harm, namely relating to the strengthening or safeguarding of a digital ecosystem. Here, a further adaptation of traditional theories of harm would be particularly useful as this type of digital development goes beyond 'traditional' conglomerate merger strategies that competition law has dealt with in the past.

57. The recent Greek *Delivery Hero* case demonstrates that conglomerate effects alone can, in fact, be significant enough to warrant commitments on the part of the digital platform wishing to acquire another company. Also, this case was preceded by a whole range of merger cases on food delivery platforms that indirectly paved the way for a more comprehensive understanding of competition issues at stake in this type of merger – with cases occurring in Poland, Portugal, Romania and Spain.[82] This shows that in their

[80] Robertson (n 11) 69.

[81] Επιτροπή Ανταγωνισμού, *Delivery Hero/Alfa Distributions/Inkat/Delivery.gr/E-table* (775/2022, 18 April 2022).

[82] 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). The latter transaction was notified to the Portuguese, Polish and Romanian NCAs. The Portuguese authority found that Portuguese merger control was not applicable to the transaction; see Autoridade da Concorrência, *Delivery Hero/Glovo* (Ccent. 61/2021, 25 January 2022).

assessment of digital mergers, competition authorities can build on previous cases, thus allowing for greater market insights and a more sophisticated analysis.

5. Conclusion

58. Merger review in digital markets may continue to rely on the three traditional theories of harm, but – as shown in the case studies above – horizontal, vertical and conglomerate theories of harm are continuously being adapted to the specific market characteristics exhibited by digital platform markets. Competition authorities need to have a detailed understanding of the functioning of digital markets as well as of the type of competitive relationships in these markets in order to meaningfully adapt the theories of harm they investigate. While this, of course, is true for any type of market, the strong network effects at play in many digital platform markets and the versatility of data mean that this market insight is particularly important in digital market environments.

59. As was seen, first cases are appearing that exclusively rely on those theories of harm that have been regarded as most adapted to digital markets in the literature, namely conglomerate ones. The Greek *Delivery Hero* case shows that conglomerate effects can, indeed, be sufficient to warrant remedies. In general, however, the ecosystem nature of many digital markets is not yet sufficiently accounted for in merger review – leaving some competition authorities with a certain unease. For this to occur, conglomerate theories of harm would need to be developed further – possibly together with horizontal and vertical theories of harm. The strengthening of a digital ecosystem can bring about efficiencies and new interoperability that consumers value. At the same time, however, the strengthening of an ecosystem through an array of tech acquisitions also provides the merged entity with a stronger market position that opens up new possibilities for abusing said market power. Merger control is not a panacea, but it can quite literally control market power before it is further strengthened or leveraged – if it applies theories of harm that are adjusted to digital market realities.