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Theories of Harm for Digital Mergers – Note by BIAC

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This document reproduces a written contribution from BIAC submitted for Item 8 of the 140th OECD Competition Committee meeting on 14-16 June 2023.

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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1. Introduction

1. *Business at OECD* (BIAC) is grateful for the opportunity to contribute to the Competition Committee's roundtable on theories of harm for digital mergers.

2. The debate on theories of harm in digital mergers is both timely and important to ensure that merger control continues to identify and address competitive harm in dynamic markets, while avoiding unwarranted or speculative enforcement. BIAC stresses the importance of merger control policy that is based on well-established economic insights. It is also important that jurisdiction in relation to proposed digital mergers only be asserted by a competition authority in a manner that respects leading case principles and is consistent with the recommendations of the OECD and the International Competition Network (ICN) made in recent years.

3. This is important for the business community and consumers more broadly because it promotes predictability and legal certainty in merger review, avoids unnecessary system frictions at the international level and reduces the risk and incidence of both type 1 (false positives) and type 2 (false negatives) errors.

4. For that reason, Section II of this paper explores whether existing theories of harm are largely sufficient to address the issues arising in digital mergers (by reference to the large number of digital mergers reviewed in the EU, for example).

5. BIAC endorses, however, the introduction of modifications to the analytical tools applied to existing theories of harm to adapt to changing circumstances, provided that such change is pursued in an economically sound manner that is predictable and consistent with evidence-based enforcement. Section III considers potential new theories of harm and explains why the careful modification/adaptation of existing analytical tools is the better approach.

6. Section IV explains why certain presumptions, including reversals of the burden of proof, should be avoided (given their impact on legal certainty) and how the role of behavioural remedies plays a consumer-friendly role in resolving vertical issues, while retaining efficiencies.

2. Established Theories of Harm Have Been Used to Assess a Large Number of Digital Mergers

7. Digital mergers are often complex. A merger may be simultaneously "vertical" (where the data from an acquired start-up serves as an additional input), "conglomerate" (where an aspect of an acquired start-up complements the offerings of the acquiring platform), and "horizontal" (where an aspect of an acquired start-up already competes, or could easily compete, with the acquiring platform's offerings). They can also represent entry into a new area by the acquirer without any of the above implications.

8. However, this does not necessarily imply that these transactions will raise unique and unprecedented issues. Many of the theories of harm that are often associated with

digital mergers – and the solutions already used by competition authorities – are well established.[1]

9. To the extent that some digital mergers raise specific challenges, this may well result from the fact that the assessment of potential risks and benefits is sometimes less readily ascertainable, but not necessarily because they display specific economic features which in themselves increase risk to competition.[2] This translates into the need for more detail and rigour to ensure merger control serves consumers effectively, rather than a need to introduce new theories of harm.

10. BIAC refers below to prominent examples, particularly in Europe, where traditional theories of harm have been applied in digital mergers (foreclosure, tying, economies of scale, etc.).[3] Below are examples of existing theories of harm being applied to digital mergers in Europe.

11. *Horizontal / Data Overlaps*: Theories of harm based on the aggregation of the parties' combined datasets were examined by the European Commission in *Apple/Shazam*, *Facebook/WhatsApp*, *Google/DoubleClick*, and *Microsoft/LinkedIn*. Theories of harm around the potential loss of dynamic competition have also been explored, e.g., *Facebook/GIPHY* in the UK.[4]

12. *Vertical*: Theories of harm concerning the foreclosure of the target company's data representing an input factor were examined by the Commission in *Google/Fitbit*, *IMS Health/Cegedim Business*, and *Meta/Kustomer*.

13. *Conglomerate*: Possible foreclosure effects of pre-installation of applications were examined by the Commission in *Microsoft/LinkedIn* and *Microsoft/Skype*. Another theoretical possibility for implementing foreclosure strategies is to restrict interoperability. This option played a role in, for example, the Commission's analysis of the proposed *Google/Fitbit* and *Meta/Kustomer* mergers. Network effects and "multi-homing" were relevant in the examination of possible foreclosure strategies in *Microsoft/LinkedIn* and *Google/DoubleClick*.

[1] For example, network effects and multisided markets are well described by economists. The scale of the effects may be greater than before, but the tools and principles that help competition authorities assess and understand those effects in the past continue to be relevant.

[2] *See, e.g.*, Kirsten Edwards-Warren, *Have European authorities been stricter with tech mergers?*, COMPASS LEXECON (Nov. 23, 2022), https://www.compasslexecon.com/the-analysis/have-european-authorities-been-stricter-with-tech-mergers/11-23-2022/#.ZEKNtjDjgX4.link.

[3] The examples are just prominent EU cases. Looking across EU member states and the UK, 97 digital mergers were reviewed in the period January 1, 2015 to December 31, 2021, Kirsten Edwards-Warren identified 21 digital mergers closing between January 2017 and June 2022 in the UK, and 40 at EU level (excluding those notified via the simplified procedure). The impact of these reviews is clear. For example, in the UK during the period above, the majority of digital mergers that the CMA did not approve unconditionally at Phase I were subsequently cancelled or prohibited, and there were no digital mergers resulting in Phase I undertakings in lieu of reference (UILs) – which was not the case for mergers in other industries. *Id.*

[4] The CMA did not appear to be hindered in conducting a far-reaching assessment, concluding for example that GIPHY's efforts to innovate and monetise its services were valuable "as they increased the likelihood of new innovations and products being made in the future, **even allowing for the possibility that GIPHY's [business model] ultimately might not have been successful**" (Summary of Final Report, Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of Giphy, Inc., (Nov. 30, 2021) (emphasis added).

2.1. Assessing Nascent Competition

14. A prominent issue in recent years is whether merger control rules adequately cover situations where the target's revenue or market share may understate its competitive significance. More specifically, there has been speculation and concerns have been voiced that, through over 800 unchallenged acquisitions over the past decade, the largest digital companies have acquired a substantial number of start-ups without antitrust intervention and that this has "helped the creation of a small number of vast digital ecosystems – and may in itself raise new competition concerns."[5]

15. BIAC has previously provided detailed comment on the application of nascent competitor theories of harm and the use of traditional tools to examine potential harms associated with such mergers.[6] There is both a jurisdictional and substantive angle to the discussions on nascent competition.

16. *Jurisdiction*: A debate has taken place about whether and how to design merger control thresholds which establish jurisdiction in connection with the acquisition of nascent competitors. This has led to amendments in a number of merger control regimes, including Germany, Austria, and Turkey.

17. Agencies are justified in setting thresholds that capture potentially harmful acquisitions including those involving nascent competitors, provided that there is a sufficiently strong jurisdictional nexus to the transaction.[7] Recommendations made by the OECD Competition Committee in 2016 and by the ICN in 2018 have made it clear that the competition authorities should only assert jurisdiction over transactions that have a material nexus to the reviewing jurisdiction. In addition, leading case principles have established that such jurisdiction should only be exercised in relation to such extraterritorial jurisdiction in relation to a proposed merger where the effects of the conduct within the reviewing jurisdiction are immediate, substantial, and foreseeable.[8] The appropriate thresholds should also be set at a value that corresponds to an acquisition capable of causing meaningful harm to competition.[9]

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[5] Viktoria H.S.E. Robertson, Merger Review in Digital and Technology Markets: Insights From National Case Law – Final Report to the European Commission ¶ 230 (Oct. 17, 2022), https://competition-policy.ec.europa.eu/system/files/2022-12/kd0422317enn_merger_review_in_digital_and_tech_markets_1.pdf.

[6] *See* OECD, Start-Ups, Killer Acquisitions and Merger Control – Note by BIAC, DAF/COMP/WD(2020)29 (June 4, 2020), https://one.oecd.org/document/DAF/COMP/WD(2020)29/en/pdf.

[7] BIAC's position regarding the importance of material jurisdictional nexus of the transaction to the reviewing jurisdiction is well-established. *See, e.g.*, *id*, ¶¶ 51, 58 and 63.

[8] *See* Executive Summary of the Roundtable on Jurisdictional Nexus in Merger Control Regimes, DAF/COMP/WP3/M(2016)1/ANN3/FINAL (Nov. 7, 2016), https://one.oecd.org/document/DAF/COMP/WP3/M(2016)1/ANN3/FINAL/en/pdf; *see also* ICN, Recommended Practices for Merger Notification & Review Procedures § II, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf; Case C-413/14 P, Intel v. Comm'n, ECLI:EU:C:2017:632 (Sept. 6, 2017); Case T-102/96, Gencor v. Comm'n, EU:T:1999:65 (Mar. 25, 1999); Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, Åhlström and Others v. Comm'n (Wood Pulp), EU:C:1988:447 (Sept. 27, 1988).

[9] A vivid and controversial example of over-reach in this regard is the use by the European Commission and EU Member States of Article 22 of the EU Merger Regulation to assess deals which not only do not meet EU or national merger control thresholds but also where the target has no ostensible or likely nexus with the jurisdiction in question. *See* Press Release, Eur. Comm'n,

18. The EU's Digital Markets Act also imposes on "gatekeepers" the obligation to inform the Commission of acquisitions "where the merging entities or the target of concentration provide core platform services or any other services in the digital sector or enable the collection of data."[10] While the Commission will not be able to review these transactions under merger control rules, this provision is presumably going to be applied alongside Article 22 of the EU Merger Regulation to review a large number of transactions carried out by gatekeepers.

19. The Court of Justice has also confirmed that the EU rules which prohibit abuse of dominance can be invoked to challenge acquisitions that have not been reviewed under merger control rules.[11]

20. *Substantive*: BIAC does not consider that nascent competitor cases raise issues that are unique to digital mergers. They are also present in traditional industries characterized by converging markets or potential competition based on disruptive business models which may not only feature price competition but may also be characterized by significant product and process innovation.

21. BIAC notes the observation by Crémer et al. that in many cases tech acquisitions are not "killer acquisitions" since the target company's products or projects are integrated into the acquirer's ecosystem, which may result in efficiency gains, provided they do not have an impact on long-term competition by, for example, eliminating a competitive threat or raising barriers to entry for other potential competitors.[12]

22. It is critical therefore that competition authorities conduct their analysis based on sound economic and factual information. Particular rigor is called for where the prospective competitiveness of a nascent company forms the sole basis for rejection of a deal.

23. Many tools exist that can help with this analysis, including a consideration of:

- Whether the deal leads to horizontal, adjacent, or vertical concerns;
- Relevant stage of product development;
- Counterfactual;
- Existence of an independent business plan;

Commission prohibits acquisition of GRAIL by Illumina (Sept. 6, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5364. In fact, GRAIL is only a start-up with no operations and no presence whatsoever in the EU, while Illumina is based in the US and the merger is subject to current proceedings brought by the FTC. This decision arguably opens the door for the European Commission to assert jurisdiction over any transaction implemented outside of the EC on the basis of possible future speculative vertical foreclosure without meeting the immediate, substantial and foreseeable threshold established by the leading cases. In BIAC's opinion, this approach contravenes international standards and good practice in terms of a minimum local nexus requirements and is a thoroughly unwelcome precedent.

[10] Regulation (EU) 2022/1925 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), 2022 O.J. (L 265) 1, art. 14(1).

[11] Case C-449/21, Towercast v Autorité de la concurrence and Ministère de l'Économie, ECLI:EU:C:2023:207 (Mar. 16, 2023).

[12] Jacques Crémer, Yves-Alexandre de Montjoye & Heike Schweitzer, Competition Policy For The Digital Era: Final Report by the European Commission 117 (2019), https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

- Whether there is any unique technology/protected intellectual property;
- Alternative pathways;
- Potential buyer factors;
- Long-term effects on the competitive landscape; and
- Potential chilling effect on innovation.[13]

24. The counterfactual is of particular importance – a key question being whether, absent the merger, the target would have developed its digital services in a way so as to more fully compete with the acquirer. In many digital mergers, this will not be a likely scenario, e.g., where a smaller target company requires its resources to keep its core business running. In any event, an economic-based probabilistic analysis of the likelihood of such a development is required, as compared to mere speculation of the possibility of future competition.

3. New Theories of Harm Should Be Developed Carefully and Only to Fill an Unambiguous Regulatory Gap

3.1. Ecosystem Reinforcement

25. BIAC is aware of a concern expressed in antitrust literature that merger control rules may not always adequately address acquisitions which create or reinforce digital ecosystems.[14] Questions have been raised about whether the focus on competition issues in specific relevant markets is sufficient and whether individual foreclosure strategies provide a complete picture given that business strategies may "transcend individual relevant markets."[15]

26. Digital mergers (leading to multiple overlaps) undoubtedly raise complex factual and economic issues. It is only correct that competition authorities continuously evaluate whether the tools at their disposal are adequate to identify and address competitive harm, including potential bundling strategies that can make entry by innovating entrants more difficult. But the competition issues are far from being clear-cut in all situations. Digital markets are often characterised by rapid innovation, which means that market evolution is very difficult to predict, and there are potential synergies from acquisitions which authorities must be careful not to prevent.[16]

27. As explained above in Section II and footnote 3, national merger control rules do not stand in the way of thorough and detailed analyses of digital mergers, including mergers

[13] *See, e.g.*, Pauline Affeldt and Reinhold Kesler, Competitors' Reactions to Big Tech Acquisitions: Evidence from Mobile Apps (DIW Berlin Discussion Paper, 2021), https://www.diw.de/documents/publikationen/73/diw_01.c.831752.de/dp1987.pdf.

[14] Crémer et al, *supra* note 12.

[15] *See, e.g.*, Robertson, *supra* note 5, at 76.

[16] Bourreau and de Streel find that the modular design of many digital products allows digital platforms to make use of their resources for a variety of different purposes, leading to significant economies of scope. Resources can relate to hardware, software or data, for instance. On the demand-side, digital platforms can benefit from buying synergies that consumers enjoy in multi-product ecosystems. Marc Bourreau & Alexandre de Streel, Digital Conglomerates and EU Competition Policy (Mar. 11, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3350512.

involving ecosystems. In the European Commission's *Google/Fitbit* case in 2020,[17] a very large number of relevant markets potentially affected by this acquisition were considered, which reflects the assessment of the "ecosystem" within which this merger was considered. The European Commission's *Meta/Kustomer*[18] review likewise assessed the combination of different types of vertical foreclosure strategies – demonstrating that the significant impediment to effective competition (SIEC) test is able to accommodate digital ecosystems.

28. Similarly, in *Microsoft/Activision*,[19] the UK Competition and Markets Authority (CMA) did not develop an ecosystem theory of harm. Instead, its assessment (rightly or wrongly) focused on traditional vertical foreclosure concerns in relevant product/service markets, informed by other factors.

29. The approach of the European Commission and other agencies to market definition in platform mergers also gives flexibility to assess the competitive impact of a merger without recourse to newly devised and uncertain theories of harm, e.g., the guidelines allow the authority to look at the impact on specific markets or the platform overall, depending on the facts of the case and business model.[20]

30. BIAC therefore underlines the need for legal predictability, consistency, and procedural fairness in this area. It is critical to identify any enforcement gap and resulting competitive harm in unambiguous terms before eschewing established and predictable approaches. Key questions include: what is the relevant change in competition dynamics?; how is digital different to other sectors?; and why is the current/developing approach inadequate?

31. In the absence of a clear definition of broad terms such as "ecosystem reinforcement" and compelling evidence of an enforcement gap, BIAC strongly encourages competition authorities, where required, to tailor existing theories of harm to the digital context and to develop guidance on its approach after proper consultation with the business community and other interested constituencies in advance.

32. The updated CMA *Merger Assessment Guidelines*,[21] particularly on input foreclosure in markets without a conventional supplier/customer relationship, is enlightening in this regard, e.g., where a merged entity uses control of a complementary product to deteriorate its interoperability with competitors or a distribution channel to make

[17] Case M.9660—Google/Fitbit, Comm'n Decision, ¶ 384 (Dec. 17, 2020) (summary at 2021 O.J. (C 194) 7), https://ec.europa.eu/competition/mergers/cases1/202120/m9660_3314_3.pdf (for an overview of affected markets).

[18] Case M.10262—Meta (formerly Facebook)/Kustomer, Comm'n Decision (Jan. 27, 2022), https://ec.europa.eu/competition/mergers/cases1/202242/M_10262_8559915_3054_3.pdf.

[19] CMA, Anticipated Acquisition by Microsoft of Activision Blizzard, Inc. Final Report, (Apr. 26, 2023), https://assets.publishing.service.gov.uk/media/644939aa529eda000c3b0525/Microsoft_Activision_Final_Report_.pdf.

[20] *See also* Edwards-Warren, *supra* note 2 (pointing out that the CMA's Meta/GIPHY decision shows how competition those concerns are rooted in the economic concepts related to digital ecosystems: "It refers to network effects 48 times and multi-sided networks (two sided or otherwise) 17 times. And it refers to multi-homing 33 times, which can neuter the power of even large multi-sided markets. […] It refers to the difficulties posed by non-monetary pricing 24 times. […] It also refers to the impact that data has on competition between rival services 21 times.").

[21] Competition & Mkts. Auth., Merger Assessment Guidelines, CMA129 (Mar. 18, 2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1051823/MAGs_for_publication_2021_--_.pdf.

it harder for rivals to attract customers.[22] In these circumstances, the CMA asks the same three questions that would be asked in more traditional instances of foreclosure, namely, "would the merged entity have the ability to harm its rivals' competitiveness, would it have the incentive to do this and would this harm overall competition?" But it also identifies new mechanisms by which the merged entity could achieve input foreclosure which are relevant to the digital economy: slowing the rollout of upgrades, deteriorating product interoperability, shutting down APIs, and limiting access to data.[23]

3.2. Data Privacy as a Parameter of Competition

33. While there may be instances where data privacy is a key parameter of competition between merging parties, there is no evidence – and little basis – to believe that this is always the case. We encourage competition authorities, as ever, to develop a realistic factual assessment of whether data privacy is relevant to the merger analysis as a measure of competition. For example, in *Google/Fitbit*, the Commission reasoned that commercial decisions concerning privacy would be subject to the GDPR, which "provides a high standard of privacy and data protection . . . and leaves little room for differentiation."[24]

3.3. Combining Datasets

34. Theories of harm based on the combination of the parties' datasets have been examined in many cases in Europe, e.g., *Apple/Shazam, Facebook/WhatsApp, Google/DoubleClick* and *Microsoft/LinkedIn* cases. In *Google/Fitbit*, the European Commission put forward a "non-traditional" horizontal theory of harm, whereby the acquisition of complementary data can strengthen an entity's market power in downstream markets or give rise to foreclosure concerns.[25]

35. The novelty of the theory of harm is that it assessed horizontal unilateral effects, even though neither Fitbit nor Google made their respective data available to third parties (i.e., there was no conventional antitrust market for the relevant data); and the two data sets were complementary inputs rather than substitutable data sets.

36. Adapting existing theories of harm to the realities of digital markets in a principled manner is a reasonable approach. It also reflects, in a sense, an "incremental" approach since the theory of harm based on complementary data has been partially explored in recent

[22] *Id.*, ¶ 7.11.

[23] *Id.*, ¶ 7.13.

[24] Case M.9660— Google/Fitbit, Comm'n Decision, ¶ 452, n.300, (Dec. 17, 2020) (summary at 2021 O.J. (C 194) 7), https://ec.europa.eu/competition/mergers/cases1/202120/m9660_3314_3.pdf.

[25] *See id.* ¶¶ 385, 399. Although the transaction did not give rise to any "horizontally affected markets in a traditional sense," the Commission looked at whether the availability of data pertaining to health and personal activities would strengthen Google's power in some data-based markets. The Commission subsequently explored the same concern in *Facebook/Kustomer* but concluded that the data that Meta would obtain from Kustomer's customers, if any, would be insufficiently significant to raise concerns and, furthermore, there was no risk of Meta foreclosing access to such data.

years.[26] However, even adaptations of existing theories of harm will raise legal and practical questions, underlining the need for progress to be made cautiously.[27]

4. Presumptions and Lowered Standards of Proof Would Lower Legal Certainty and Sacrifice Benefits

37. The characteristics typical of digital markets and business models can increase the potential for merger-related efficiencies:

- Positive network effects can lead to consumers benefiting from higher market concentration.
- Digital ecosystems create synergies by offering consumers the possibility of "one-stop shopping."
- Acquisitions of small, innovative start-ups by large digital companies can create synergies and efficiencies by bringing together the acquirer's capabilities and resources and the target company's innovative ideas, products, and services.

38. The prospect of a later takeover by a large digital company can also spur innovation in the start-up community and creates corresponding incentives for investors to provide financing for such start-ups. Some mergers could generate efficiencies by eliminating inefficient parallel innovative efforts by the parties to the merger.

4.1. Lowered Thresholds are Unnecessary and Inadvisable

39. BIAC is aware that of the contention that competition authorities face a more difficult task in attempting to establish harm in digital mergers beyond the burden of proof than with other types of transactions because innovation is intangible and damage to it is more challenging to prove than, for example, likely increases in price. Options under discussion include reversing the burden of proof for mergers involving large digital companies and making the requirements for the necessary degree of probability more flexible.[28]

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[26] The Commission had explored similar concerns in *Facebook/WhatsApp* and *Microsoft/LinkedIn* before dismissing them.

[27] *See, e.g.*, Gerwin Van Gerven, Annamaria Mangiaracina, Will Leslie & Lodewick Prompers, *Data and Privacy in EU Merger Control*, GLOBAL COMPETITION REV. (Nov. 25, 2022), https://globalcompetitionreview.com/guide/digital-markets-guide/second-edition/article/data-and-privacy-in-eu-merger-control (pointing out that the case raises the following legal and practical questions, "Given that neither Fitbit nor its data exercised a competitive constraint per se on Google for digital advertising, by how much must the complementary data strengthen the market position of the undertaking active in the downstream market? How should the balancing exercise between short-term benefits and long-term harm be conducted? In particular, to what extent does the uncertainty around any putative longer-term harm mean that it is discounted against the more certain short-term benefits? . . . [D]o the conceptual difficulties posed by the theory of harm mean that the Commission is only likely to invoke it in limited circumstances? For example, is it only relevant where the relevant undertaking holds a dominant position in the downstream market and the data is unique? Or does the theory of harm have much wider application?").

[28] Tommaso Valletti, *How to Tame the Tech Giants: Reverse the Burden of Proof in Merger Reviews*, PROMARKET (June 28, 2021), https://www.promarket.org/2021/06/28/tech-block-merger-review-enforcement-regulators/; Competition & Mkts. Auth., Unlocking Digital Competition: Report of the Digital Competition Expert Panel (2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital

40. BIAC is concerned at the suggestion of fixed, irrebuttable presumptions, reversed burdens of proof, or lowered substantive thresholds for digital mergers. There is still an insufficiently clear causal link between market structure and harm to innovation, particularly with respect to the concept of digital ecosystems. Presuming harm in the absence of evidence or when the empirical evidence remains unclear risks poor outcomes, not to mention placing undue burden on merging parties (which lack the agencies' powers to collect relevant evidence from third parties) and discouraging merger activity that may advance innovation.

41. The introduction of a presumption of harm is even more questionable when contrasted with the treatment of efficiencies which may generally be discounted in merger investigations because of difficulties relating to their predictability, e.g., in the EU.[29] The Commission has only ever accepted the possibility of efficiencies in a small number of cases, and they have never been deemed sufficient to offset competition concerns from those mergers.[30]

42. Regarding the relaxation of the substantive test, BIAC concurs with the view expressed by the CMA in response to a suggestion that competition authorities could apply a "balance of harms" approach whereby, in a merger assessment, agencies could take into account anti-competitive effects that have a low probability but a high impact. The CMA pointed out that this "fundamental shift in merger policy" would result in "unintended consequences."[31]

_competition_furman_review_web.pdf; Lear, Ex-post Assessment of Merger Control Decisions in Digital Markets (2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803576/CMA_past_digital_mergers_GOV.UK_version.pdf; Stigler Committee on Digital Platforms Final Report (2019), https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf; H. COMM. ON JUDICIARY, SUBCOMM. ON ANTITRUST, COMMERCIAL, AND ADMINISTRATIVE LAW,REPORT ON INVESTIGATION OF COMPETITION IN DIGITAL MARKETS (Comm. Print 2022), https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf; Crémer et al., *supra* note 12.

[29] Sebastian Muller & Arthur Stril, *European Merger Control and Innovation Competition: Moving the Goalpost*, 2 COMPETITION L. & POL'Y DEBATE 52, 54 (2016); Raphael De Coninck, *Innovation in EU Merger control: in need of a consistent framework*, 2 COMPETITION L. & POL'Y DEBATE 41, 50 (2016); Petit, *Innovation Competition, Unilateral Effects and Merger Control Policy*, 82 ANTITRUST L.J. 873, 876–77 (2019); Mario Todino, Geoffroy van de Walle & Lucia Stoican, *EU Merger Control and Harm to Innovation — A Long Walk to Freedom (from the Chains of Causation)*, THE ANTITRUST BULLETIN, 64(1), 11, 18 (Dec. 2018), https://doi.org/10.1177/0003603X18816549; Daniel A. Crane, *Rethinking Merger Efficiencies*, 3 MICH L. REV. 110 (2011).

[30] Case M.4854—TomTom/TeleAtlas, Comm'n Decision (May 14, 2008) (summary at 2008 O.J. (C 237) 8), https://ec.europa.eu/competition/mergers/cases/decisions/m4854_20080514_20682_en.pdf; Case M.6570—UPS/TNT Express, Comm'n Decision (May 12, 2015) (summary at 2014 O.J. (C37) 8), https://ec.europa.eu/competition/mergers/cases/decisions/m6570_20130130_20610_4241141_EN.pdf.

[31] Letter from Andrea Coscelli, CEO, Competition Mkts. Auth. to Alex Chisholm, Permanent Secretary, Business, Energy and Industrial Strategy, and Charles Roxburgh, Second Permanent Secretary, Her Majesty's Treasury (Mar. 21, 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/788480/CMA_letter_to_BEIS_-_DCEP_report_and_recommendations__Redacted.pdf. The CMA later noted that "[n]on-price outcomes such as harm to innovation and improving the customer experience . . . can be assessed in the current framework," citing its recent investigation of the proposed acquisition of ClearScore by Experian as an example. Tim Geer, *Merger Controls in the Digital Age: Investigating the Proposed Experian*

43. In summary, BIAC continues to underline the need for factual analysis and evidence-based, economically sound enforcement in relation to all mergers. There are undoubtedly challenges in predicting harms and benefits in dynamic markets, but this is also true for the merging parties. A general presumption or lowered substantive test would require the parties to make assertions about the future competitive strength of competitors, without the power to gather relevant information that vests in the agencies. Rather than shift the burden on to the merging parties, a more effective and proportionate approach would be for competition authorities to use their evidence-gathering powers to seek relevant internal documents of market participants – not just the merging parties – when assessing digital mergers, as well as seeking to enhance their in-house knowledge and expertise in digital markets.

4.2. Behavioral Remedies Remain Appropriate to Address Vertical Concerns

44. BIAC commends competition authorities for having developed behavioural remedies in the digital and technology sectors to preserve the benefits of digital mergers while addressing their concerns.[32]

45. The Commission's data access and interoperability remedies in both *Google/Fitbit* and *LSE/Refinitiv* show how it is possible to preserve a level playing field despite the complexities of data markets. BIAC notes in particular to the "future-proofing" aspect as the commitments are expressed to be able to expand to capture data outside the scope of the commitment at the time of the Commission's decision.[33]

5. Conclusion

46. BIAC underlines the need for digital merger control enforcement to remain predictable and evidence based. Tampering with substantive thresholds, reversing burdens of proof or introducing fixed, irrebuttable presumptions for digital mergers would be unwelcome and inadvisable.

47. Competition authorities should continue to focus on well-established tools and theories of harm – tailored to digital realities and explained clearly in guidance which has been developed through a consultation process. New and untested theories of harm and "labels" should remain a last resort, used only where there is a clearly understood regulatory gap.

48. BIAC also welcomes the recent trend which sees competition authorities building in-house expertise to help them navigate high-tech markets and understand their nature and

and Clearscore Merger, COMPETITION & MKTS. AUTH. BLOG (Apr. 11, 2019), https://competitionandmarkets.blog.gov.uk/2019/04/11/merger-controls-in-the-digital-age.

[32] Access and interoperability commitments are regularly used. BIAC notes for example that access to APIs on non-discriminatory terms has become a frequent type of access remedy that seeks to ensure interoperability so that no foreclosure effects can arise while at the same time enabling efficiencies from mergers to materialise.

[33] Press Release, Eur. Comm'n, Mergers: Commission Clears Acquisition of Fitbit by Google, Subject to Conditions (Dec. 17, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2484; Press Release, Eur. Comm'n, Mergers: Commission Clears Acquisition of Refinitiv by London Stock Exchange Group, Subject to Conditions, (Jan. 13, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_103.

dynamics.[34] This type of capacity-building needs to include adequate evidence-gathering powers, including the ability to send reasonably tailored mandatory requests for relevant documents and information to merging parties and third parties. These powers are essential to enable competition authorities to gather reliable information across the board from all useful sources.

[34] *See, e.g.*, the CMA's DaTA Unit where data scientists, behavioural scientists, and technology strategic insight advisers will help shape new enforcement approaches needed by the CMA to deal with digital competition issues. Similarly, the Australian Digital Platforms Inquiry endorses the creation of a "specialist digital platforms branch" within the Australian Competition and Consumer Commission.