Research paper

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Killer Acquisitions in Digital Markets

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“If you want things done, you need to be able to find solutions.”

Margrethe Vestager

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List of abbreviations

ARCEP	The Postal and Electronic Communications Regulatory Authority
ECJ	European Economic Community
EEC	European Economic Community
EU	European Union
DMA	Digital Market Act
DMT	Digital Markets Taskforce
DSA	Digital Service Act
FTC	Federal Trade Commission
GDPR	General Data Protection Regulation
NRE	Laws on new economic regulations
OECD	Organisation for Economic Co-operation and Development
R&D	Research and Development

Introduction

Paragraph 1-Introductory comments

1. Competition law is structured in three branches: agreements, i.e. cartels, abuses of dominant position and mergers or concentrations[1]. European and French texts regulate this type of operation in order to protect the free play of competition and innovation, whether by ex ante or ex post controls on operations. Competition law intervenes essentially ex post by sanctioning abuses of a dominant position. Merger law intervenes ex ante.

2. Initially, merger law is European, originally it was the States that set up merger control, in France it was in 1977 with an optional control of merger operations. Then in 2001, by the law on new economic regulations (NRE), than a mandatory and ex ante regime was established. Since 2011, the Competition Authority has issued more than 2,400 merger decisions.[2]

Prior to the creation of a specific mechanism by the European Commission in the 1960s, the Commission had occasionally used Articles 85 and 86 of the Treaty establishing the European Economic Community (now Articles 101 and 102 of the Treaty on the Functioning of the European Union) to oppose certain merger operations. Merger control in Europe was only established with the adoption of Regulation (EEC) No 4064/89 of 21 December 1989. This regulation imposes an obligation of prior notification and suspends the operation if certain turnover thresholds are exceeded.
Since the establishment of this "one-stop shop" a quarter of a century ago, almost 8083 cross-border mergers have been notified to the European Commission, i.e. an average of about 260 cases per year.[3]

3. Merger control aims to prevent the creation, through acquisitions or other structural regroupings, of undertakings which will have the incentive and ability to exercise market power. A merger, as defined in Article L 430-1 of the Commercial Code, is the take-over of an

[1] Droit et politique de la concurrence en France, Michael Wise

[2] Key figures, Competition Authority website

[3] Public statistics from DG COMP, March 2021 (**Appendix 1**)

undertaking by another undertaking which necessarily involves a change of control and which results in a decisive influence.

At the European level, the reference text is Regulation 139/2004, which defines concentration in Article 3" 1. A concentration shall be deemed to arise where a lasting change of control results from: (a) the merger of two or more undertakings or parts thereof, or (b) the acquisition, by one or more persons already controlling at least one undertaking or by one or more undertakings, of direct or indirect control of the whole or parts of one or more other undertakings, whether by way of acquisition of shares in the capital or of assets, by contract or by any other means. 2. Control arises from rights, contracts or other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on the activities of an undertaking.

4. A merger may, however, have a detrimental effect on the market, when a dominant or structuring player in a market directly or indirectly acquires an innovative or promising player [4]and the purpose of this move for these players is to strengthen their position in the market and to achieve external growth which has the consequence or objective of preventing the emergence of a potential competitor and eliminating or mothballing that competitor or the products or services it was developing.[5]

According to the OECD, predatory acquisitions occur when "firms with substantial or dominant market power use their market power to acquire competing firms or to prevent the entry of new competitors, in order to maintain or increase their market power and reduce competition ».[6]

The Harvard Law Review states that, killer acquisitions are strategic acquisitions made for the purpose of 'eliminating effective competitors and monopolizing or impeding a market'. They often

[4] Dictionnaire de Droit à la Concurrence, Cynthia Picart

[5] Ibid

[6] Policy Brief on Predatory Acquisitions", OECD Journal: Competition Law and Policy, Vol. 5, No. 2, p. 45-55.

involve the acquisition of rival firms with the intention of eliminating them from the market or deterring other potential competitors.[7]

5. In cases where merger control rules do not apply, competition authorities may examine a specific acquisition if it is likely to have anti-competitive effects. In this case, the focus is on the effects of the acquisition on the market structure and the ability of competitors to maintain effective competition.

The control of killer acquisitions is usually the responsibility of competition authorities, such as the European Commission, or national competition authorities. These authorities have investigative, sanctioning and remedial powers to prevent killer acquisitions and maintain a healthy competitive environment.

6. The killer acquisitions in the digital market are an increasingly important issue in the field of competition and economic regulation. As the digital sector continues to grow rapidly, companies often seek to extend their market reach by acquiring potential competitors or innovative start-ups. However, some of these acquisitions may have predatory motives, aimed at eliminating competition, maintaining a monopoly or hindering innovation.

The digital market is characterised by dominant players with considerable power and competitive advantages, such as huge user bases, massive data and considerable financial resources[8]. In this context, the killers acquisitions can be used as a strategic means to strengthen this dominant position and drive out potential competitors.

The killer acquisitions can take different forms in the digital field. It can involve acquiring direct rivals to drive them out of the market, buying up innovative start-ups to neutralise their competitive impact, or acquiring key technologies or data to restrict market access. These practices raise major concerns about competition, innovation, consumer choice and data protection.

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[7]Epstein, R.A. (2002), "Predatory Acquisitions: A New Analytical Framework", Harvard Law Review, Vol. 115, No. 6, p. 1556-1628.

[8] Unlocking digital competition, Report of the Digital Competition Expert Panel

To address this challenge, competition authorities and digital regulators are seeking to strengthen their tools and approaches to detect, prevent and sanction killer acquisitions. The aim is to preserve a healthy competitive environment, foster innovation and ensure consumer welfare in the digital economy.

7. In contrast to killer acquisitions, which aim to eliminate competition, consolidating acquisitions are made with the aim of strengthening the acquiring company by taking advantage of the potential synergies and competitive advantages offered by the merger with another company.[9]

In the digital sector, consolidating acquisitions are common due to the competitive dynamics and rapid pace of technological change. Large digital companies, such as the technology giants, may seek to acquire innovative start-ups or smaller companies that have developed complementary technologies or services to their own offerings, which can reduce their dependence on a single product or specific sector.

These acquisitions may allow them to diversify their activities, extend their geographical reach, access new user bases or consolidate their hold on specific market segments.

Consolidating acquisitions can offer several benefits to companies, such as access to advanced technology, expansion of product or service offerings, acquisition of key talent and expansion of distribution capabilities. It also allows them to strengthen their competitive position by limiting the entry of new players into the market.

8. Recently, an information report No. 755 (2021-2022) of the Economic Affairs Committee was submitted on 6 July 2022 by Ms Sophie Primas, Ms Amel Gacquerre and Mr Franck Montaugé at the conclusion of their information mission on France's economic sovereignty.

At the heart of this report are five plans to rebuild economic sovereignty, one of which concerns the protection of companies, and more particularly the desire to fight against killer acquisitions of

[9] Information report by the Economic Affairs Committee on digital platforms n°3127, June 24, 2020

strategic companies or foreign subsidies that hamper our capacity for innovation and threaten the nation's essential activities. [10]

One of the proposals is to improve coordination between the Competition Authority and the European Commission. This would mean that the Authority could intervene in a subsidiary manner in cases rejected by the European Commission.
But also introducing notification of acquisitions with a high market value but below the turnover thresholds, this measure aims to strengthen the fight against killer acquisitions, especially in the digital sector.
Furthermore, it is also suggested to deepen the reform of European merger control law in order to protect consumers and preserve industrial sovereignty.
In this process, the European Commission's forward-looking and comprehensive vision should be taken into account, in particular with regard to the definition of relevant markets.

The current regulatory framework is unsatisfactory because it does not allow for the proper understanding and control of these anti-competitive practices. The Digital Market Act (DMA) could, to a large extent, make it possible to capture this type of practice.

9. The Digital Market Act (DMA) of 14 September 2022, aims to regulate the operation of large digital platforms and to promote equitable competition on these markets. The DMA specifically targets gatekeepers or dominant players in digital markets, which have a significant impact on market functioning and competition.

The main measures of the DMA[11] include the imposition of specific obligations on gatekeepers to ensure transparency, fair access to data, prevention of anti-competitive practices and effective remedies for users and competitors. The DMA also allows regulators to impose fines and penalties for non-compliance.

The DMA proposes to impose an obligation on gatekeepers to notify their acquisitions in advance to the regulatory authorities, either the European Commission or national competition authorities. This

[10] Information Report No. 755 (2021-2022), filed July 6, 2022

[11] 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

measure is intended to increase transparency and allow for a prior assessment of potentially killer acquisitions.

The DMA provides for a specific assessment of acquisitions by gatekeepers to determine their impact on competition. Regulators will carefully consider whether an acquisition is likely to eliminate or lessen competition in a harmful way. While the Commission's merger control jurisdiction normally applies only to transactions above the European thresholds, Article 22 of the 2004[12] Merger Regulation provides that one or more Member States may request the Commission to examine a concentration below the thresholds if it would affect trade between Member States and competition within the territory of the Member States making the request.

Once informed by the European Commission that a "below threshold" merger or acquisition has been notified by an undertaking, the competent national authorities in France, the Competition Authority, may ask the European Commission to examine it. The competent national authorities have the power to intervene and prevent an acquisition if it is deemed predatory and likely to harm competition in the digital market.

These DMA measures aim to prevent killer acquisitions, maintain a healthy competitive environment and promote equitable competition in digital markets. They are designed to prevent dominant players from using strategic acquisitions to eliminate or weaken their potential competitors, thereby ensuring diversity of players and innovation in these markets.
The practice of the European Commission has evolved in this area, and it has been able to make a new reading of Article 22, by accepting to control a transaction that would have been referred to it by a national Authority even if the transaction in question is "below the national thresholds". But here again, there is no obligation on the Commission to do so.

As a result, the European Commission's merger control tools appear to be inadequate in the face of developments in certain players and markets, such as two-sided markets and multi-sided markets.

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[12] Article 22
Referral to the Commission
1. One or more Member States may request the Commission to examine any concentration as defined in Article 3 that does not have a Community dimension within the meaning of Article 1 but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request.

Paragraph 2- Presentation of the subject of the report

10. The killer acquisitions in the digital field have attracted increasing attention because of their potential impact on competition and innovation. Large digital companies often use these practices to strengthen their dominant position by eliminating or weakening competing players.

11. This research report aims to investigate killer acquisitions in the digital market in depth, analysing the effects of these associated anti-competitive practices and exploring possible regulatory remedies and regulations.

Paragraph 3-Announcement of the plan

12. We will focus on the effects of killer acquisitions in the digital market (part 1) and who is affected by these operations. We will then examine the different types of control of killer acquisitions in the digital market (part 2).

Part 1-The effects of killer acquisitions on the digital market

Chapter I-With regards to consumers

A. Impact on consumer choice

13. The killer acquisitions in the digital sector can indeed reduce the choices available to consumers. When a large company acquires a smaller, competing company, it can exert greater control over the market and limit competition. This can result in fewer independent businesses offering similar products or services.

When there is less choice in the market, consumers may be faced with less diversity, potentially higher prices and less innovative services or products. The absence of competition can also reduce the incentive for companies to improve the quality of their products or services, which can harm the consumer experience.

European competition policy is based on consumer welfare. It seeks to avoid consumer harm in the form of higher prices, lower product quality or less choice in the market as a result. [13]

1. Less choice for consumers

14. When a large company acquires smaller competitors, this can lead to a reduction in the number of independent companies offering similar products or services. This reduces the diversity of options available to consumers.

The killer acquisitions can lead to an excessive concentration of market power in the hands of a few large companies. This can limit competition and reduce incentives to innovate, resulting in limited choice for consumers.

[13] Information Report No. 603 (2019-2020), filed July 8, 2020

15. When a company makes a killer acquisition, it may use dark patterns[14] to facilitate the acquisition or to maximise its competitive advantage. For example, it may set up deceptive interfaces to induce users of the acquired company to provide consent for the transfer of their personal data to the acquirer, without them fully understanding the implications.

Furthermore, once the acquisition is complete, the company may use dark patterns to manipulate users into adopting specific products or services, thereby limiting consumers' real choices.
The Senate Economic Affairs Committee has adopted a bill to prevent platforms from forcing consumer choices[15]. The aim is to ensure the sincerity of user interfaces.

16. The DMA, in its Article 5, includes measures to give consumers more choice without being constantly subjected to predatory practices that limit them to one market. Certain tied offers will therefore be prohibited, as they could prevent third party competitors from entering the market for services offered by the dominant players. For example, regulated app shops will no longer be allowed to impose their own payment systems on app developers. The latter will be able to redirect transactions to their own websites or use an alternative payment system. The aim is to foster équitable competition and encourage innovation by avoiding practices that could limit choice and market openness.

2. Higher prices

17. When there is less competition in the market, companies may have more freedom to raise the prices of their products or services. Consumers may be forced to pay higher prices due to the lack of competitive alternatives.

18. According to the OECD[16], an abusive price is one that is significantly higher than the competitive price due to the presence of a monopoly or the exercise of market power. In a competitive market, any increase in tariffs by a player exposes him to the risk of losing

[14] Design of digital interfaces that lead you to make a choice that you did not want, example: this insurance taken out because of a pre-ticked box, this service impossible to leave.

[15] Bill n° 106 adopted by the Senate aiming to guarantee the free choice of the consumer in cyberspace

[16] OECD Book, Abuse of Dominance in Digital Markets, 2020

customers to a competing company offering more attractive prices. Thus, competition acts as a market regulation mechanism.

However, the situation is different when a dominant firm operates in a captive market, where consumers have no credible alternative to escape the extra costs of the dominant firm's offerings. This dominant position may be reinforced by the existence of a network effect in the digital field.

19. It is far from clear that an abuse of dominance is established by reason of abusive pricing. In a market economic system, the allocation of resources is based on the interaction of supply and demand around a price which must be flexible and variable. Thus, the freedom to set prices is a fundamental component of the market economy. In Europe, although the principle of the prohibition of abusive pricing by a dominant undertaking is well established[17], its demonstration remains subject to a high standard of proof.

20. In the case of a merger, there is a possibility that collective welfare in the short term will be impacted even if there are positive repercussions in the longer term. This is linked to the existence of information asymmetry, which makes it difficult to assess the efficiency gains from a horizontal merger before it is actually implemented. It is important to anticipate the strategies of economic actors that have a direct influence on market structures.

Information asymmetry can make it difficult to predict the effects of a merger, as stakeholders may have different information and motivations. Short-term effects may be easier to identify, but potential long-term benefits may take longer to materialise.

In addition, it is essential to take into account the strategies of the economic actors involved. They may have competing interests and use the merger as a means to increase their market power rather than to achieve efficiency gains that will benefit the collective welfare.

3. A decline in the quality of products or services

[17] ECJ, 13 November 1975, General Motors, Case 26/75

21. When competition is reduced, companies may have less incentive to invest in improving the quality of their products or services. This can lead to a decline in the perceived quality of products or services by consumers.

The killer acquisitions can also discourage innovation in the digital sector. Small innovative companies that could have emerged as competitors are often absorbed by large companies, reducing new ideas and technological advances.

Horizontal mergers usually increase prices, reduce output, decrease innovation[18] or the quality of products and services, either unilaterally (non-coordinated or unilateral effects) or jointly with its competitors (coordinated effects).

22. In some cases of mergers in the digital sector, it is possible to see a reduction in investment in research and development (R&D). When a merger takes place, the merged company may seek to achieve economies of scale and streamline its operations, which may include reducing R&D budgets.

Companies may be motivated by objectives such as maximising short-term profits, consolidating their market position or reducing costs. In these circumstances, it is common to see reductions in R&D expenditure, which may be seen as short-term costs rather than long-term investments.

It should also be noted that reduced R&D investment following a merger may have negative long-term consequences, as it may reduce the innovative capacity of the merged company and limit its competitiveness in the market.

However, it is important to note that not all mergers necessarily lead to a reduction in R&D. Some companies can actually use the synergies resulting from the merger to strengthen their innovation capacity and increase their R&D efforts. This depends on the strategic objectives and priorities of the companies involved in the merger.

[18] N. Petit, Droit européen de la concurrence, op. cit., p. 507.

23. In the Google Android case, for example, the consumer reaction to a slight decline in the quality of Android was studied: would the consumer prefer Apple? It was concluded that the degree of expertise required to notice the change, the non-portability of data and the high purchase price of an Apple smartphone would not lead to a "switch to competition" on the part of the consumer and therefore Apple could not be considered as a competitor effectively threatening Google's dominant position.

B. Insufficient protection of consumer data

1. The problem of insufficient consumer data protection: Issues and considerations

24. The UK Digital Markets Taskforce (DMT) highlights the specific harm suffered by consumers due to the market power held by platforms. It points out that in a more competitive market, consumers might be less compelled to disclose as much personal information to access online services. In addition, they could benefit from greater protection and control over their data. It is also suggested that consumers could be rewarded in some way for providing their data.[19]

25. Some academic researchers believe that the lack of privacy protection in some markets may be a direct consequence of the exercise of market power. Robertson states that « consumers rarely have a say in privacy as a component of online product quality, as they generally do not have the option of avoiding some leading digital service providers »[20]. Considering that mergers, anti-competitive practices and commercial agreements result in sub-optimal levels of data protection and privacy, it becomes clear that competition policy and enforcement can play a crucial role.

Gilbert and Pepper further propose that: « the disappearance of a major 'maverick' that has developed innovative data protection and control systems would be likely to raise competition

[19] Competition and Markets Authority, CMA, 2020

[20] Robertson, V. (2020), « Excessive Data Collection: Privacy Considerations and Abuse of Dominance in the Era of Big Data », *Common Market Law Review*

concerns by limiting innovation in data protection, even if the merging parties were not previously in direct competition ».[21]

Condorelli and Padilla also support an enveloping strategy of « privacy policy linkage »[22] that would increase the amount of consumer data collected in a conglomerate merger. According to this theory, a dominant company could obtain broad consent from its users, which it could then use in the new markets it acquires as a result of a merger, especially when the same consumers are present in both markets. This approach is intended to streamline and facilitate the collection and use of consumer data across different areas of the merged company's business.

26. Article 5 of the DMA provides remedies: end consumers will have to consent to the cross-referencing and re-use of their personal data between the services of a gatekeeper. Thus, a gatekeeper of a social network will no longer be able to use personal data generated on that social network to improve ad targeting on another social network without the user's explicit consent. In particular, the gatekeeper's targeted advertising services will be more easily disputable because they are less directly appropriable by the gatekeeper.

2. Concrete cases of insufficient consumer data protection: Case studies and implications

27. In practice, many mergers have been prevented or conditionally cleared because of concerns about potential anti-competitive effects related to the consumer data sets held by the merged firms in the relevant markets.

28. In its assessment of the merger between Google and DoubleClick in 2008, the European Commission considered that privacy issues were governed by data protection law. The merger between Google and DoubleClick involved two entities capable of collecting and exploiting vast amounts of consumer data: Google through its online search services, and DoubleClick through its ad serving services. Although the European Commission has examined how these companies use consumer data, it believes that it is data protection law that must be applied to ensure privacy. It also states that, regardless of the approval of the merger, the new entity is

[21] Gilbert, P. et R. Pepper (2015), Privacy Considerations in European Merger Control: A Square Peg for a Round Hole, Competition Policy International

[22] Condorelli, D. et J. Padilla (2019), Harnessing Platform Envelopment Through Privacy Policy Tying

obliged in its day-to-day operations to respect the fundamental rights recognised by all relevant instruments, including the protection of users' privacy and data.[23]

In the US, the FTC took a similar position in its assessment of the Google/DoubleClick merger. Although it did not conclude that competition law necessarily had to take privacy consequences into account, the FTC nevertheless found that the merger would not have an adverse effect on the non-price aspects of competition.[24]

The Commission does not have the legal Authority to impose conditions on the merger that are not antitrust-related. Moreover, regulating the confidentiality obligations of a single company could result in significant harm to competition in this large and rapidly evolving sector.

29. The European Commission confirmed this legal separation of competition and consumer data issues in its review of the TomTom/TeleAtlas merger, which was a vertical merger between a navigation service provider and a digital map provider.[25]

In several subsequent decisions, the European Commission appears to have used EU data protection laws to limit the potential decrease in privacy protection resulting from the relevant mergers, whether through increased collection, aggregation or use of consumer data.

30. In 2012, the merger between Facebook and Instagram was approved by both the FTC in the US and the former Office of Fair Trading in the UK. These competition authorities did not appear to be concerned about the potential data protection and privacy implications of the merger.[26]

31. The European Commission has again called on EU data protection legislation and cleared the Microsoft/LinkedIn merger in 2016. It points out that the legislation will limit the way in which the merged entity can combine data from both companies.[27]

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[23] European Commission (2008), Case No. COMP/M.4731 - Google/ DoubleClick

[24] Federal Trade Commission (2007), Statement of the Federal Trade Commission concerning Google/ DoubleClick

[25] EC (2008), TomTom/Tele Atlas

[26] OFT (2012), Anticipated acquisition by Facebook Inc of Instagram Inc
FTC (2012), FTC Closes Its Investigation Into Facebook's Proposed Acquisition of Instagram Photo Sharing Program

[27] European Commission (2016), Case No M.8124 – Microsoft/LinkedIn

32. Therefore, there seems to be a growing awareness of the ability of companies to compete on data protection. Questions have also been raised about the competitive consequences of combining the consumer data sets held by the merging parties. It would appear that competition authorities are increasingly taking these concerns into account in their merger assessments. To date, no merger has been challenged on the grounds that it would have reduced the level of data protection in the relevant market.

Chapter II-With regards to undertaking

A. Acquisitions of low-value companies

33. Start-ups or nascent companies play a vital role in competitive markets, but traditionally their importance for merger control has been limited to demonstrating that a relevant market is likely to become increasingly competitive.

34. Traditionally, however, their importance in merger control has been largely limited to their role as new entrants. They have rarely emerged as parties to the merger. Because of their small size, they had a low turnover and, in any case, were considered to exert little competitive pressure, at least until they had the chance to grow like a larger company.

1. Impact on innovation

35. Recent studies have shown that in some cases the acquisition of a start-up company has resulted in the loss not only of a competitive constraint but also of a product (such as when the acquisition of a retail business results in the closure of a shop). [28]

36. There may be limited overlaps in existing markets, but these overlaps may increase over time. For example, a competing platform may not yet have achieved sufficient scale to offer network effects and thus become a strong competitor.

Potential overlaps may develop in existing markets, such as future monetisation through advertising.
Potential overlaps may develop in future markets, where products may increasingly compete with each other, as is the case with connected watches and mobile phones.

37. The maturity of the acquired companies is also a factor, as highlighted by researches by Argentesi et al (2020), which shows that the median age of the companies acquired by Amazon

[28] OECD, Directorate for Financial and Enterprise Affairs, Competition Committee, Secretariat Background Note, 27 May 2020

was 6.5 years, 2.5 years for Facebook and 4 years for Google. It is important to note that existing competitive constraints are not always a reliable indicator of future constraints.

In addition, studies by Gautier and Lamesch (2020) analysing 175 acquisitions by Google, Amazon, Facebook and Microsoft over a three-year period reveal that in 105 cases, the brands of the target companies were abandoned within a year of the acquisition.

2. Access to sensitive data

38. Where this killer acquisition is aimed at accessing sensitive data in the digital sector, this is of great concern. Sensitive data can include confidential, personal, financial or strategic information such as customer data, trade secrets, patents and operational plans that are crucial to a company.

As part of the due diligence process and post-merger integration, it is common for sensitive data to be exchanged or shared. To address these concerns, certain measures may be put in place.

39. For example, confidentiality agreements may be signed by the parties defining the rules and obligations of confidentiality regarding the obligations exchanged during the merger process.

It will also be possible to control access, only to those who need it and who have been duly authorised. For example, by setting up passwords, two-factor authentication systems, specific access permissions. It is also advisable to encrypt data during transmission and storage, in combination with IT security measures. Finally, a thorough assessment of compliance with data privacy laws and regulations, in this case the General Data Protection Regulation (GDPR), is recommended.

40. When sensitive data is exchanged or shared in a merger, it can potentially enhance the market power of the merged entity. Such sensitive data may give an advantage to the new merged entity, and make it difficult for other market players to compete fairly. Competition regulators carefully examine the potential effects of the merger on sensitive data, and competition may be distorted where the entity has an unfair competitive advantage.

If the merger raises barriers to entry, including access to sensitive data, this may impede entry and restrict competition.

B. Acquisitions of businesses to strengthen a leadership position

41. Acquisitions aimed at eliminating competition and preventing competitive entry are consolidating acquisitions. The killer acquisitions can enable a company to gain a leadership position in the market by eliminating competition[29]. This can lead to market consolidation and reduced fragmentation, which can improve industry efficiency and profitability.

Double-Click was acquired by Google in 2007 for the then seemingly inconceivable sum of USD 3.1 billion. This illustrates an acquisition strategy that is not killer but consolidator. Google took control of an essential complement that would enable it to enhance its data and market position in the attention market. The acquisition was therefore crucial for the completion of its business model.

1. Market consolidation

42. In the digital sector, the Furman report (2019) notes that over the past ten years, Amazon, Apple, Facebook, Google and Microsoft have made around 400 acquisitions worldwide. In 2017, for example, The Economist reported that Alphabet (Google), Amazon, Apple, Facebook and Microsoft together spent USD 31.6 billion to acquire start-ups.[30]

Lear conducted an ex-post evaluation of the CMA's merger control decisions in the digital markets[31]. This assessment shows that Google, Amazon and Facebook made a total of 299 acquisitions between 2008 and 2018. Very few of these mergers were subject to a Phase 1 review by the CMA, and even fewer were subject to a detailed review. Similarly, very few of these mergers have been reviewed by the European Commission.

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[29] Preventing post-merger/acquisition difficulties using crisis management, Karine Evrard Samuel, In Revue française de gestion 2003/4 (no 145)

[30] The Economist, 26/10/2018, « American tech giants are making life tough for start-ups »

[31] The report was commissioned by the UK's Competition and Markets Authority (CMA); it focuses on the ex post assessment of previous decisions relating to mergers in the digital sector in the United Kingdom, "Ex-post Assessment of Merger Control Decisions in Digital Markets" (Lear report)

43. GAFAMs have succeeded in implementing a global strategy that goes beyond the mere closure of a platform.[32] This seemingly conglomerate strategy is actually aimed at creating ecosystems where users can move from one service to another - such as Google Search, Gmail, Google Maps, Calendar, etc. - without needing to use other services. - without having to use services from different environments.[33]

44. The digital market is growing significantly, with many sectors forecasting a long-term doubling of the share of online sales. For example, the travel sector already accounts for 20% of business volume through e-commerce, while in advertising this share reaches 10%. However, barriers to entry are low: the number of merchant websites in France, including price comparison sites, is growing at an average rate of 30% per year.[34]

2. Reducing of fragmentation

45. Acquisitions allow a company to acquire other competing or complementary companies, leading to the consolidation of market players. By bringing companies together under a single entity, competition between them is reduced, thereby reducing market fragmentation.

By acquiring direct competitors, a company can eliminate or significantly reduce competition in the market. This further concentrates power and control in the hands of a few key players, thereby reducing competitive fragmentation.

46. The main challenge we face is obvious: the lack of a single market in the digital field. This leads to fragmentation, with different national regulations. Global players benefit from large domestic markets, while national or regional markets are not large enough to generate significant end-demand or to support investment and innovation.

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[32] see graph **Appendix 2**

[33] GAFA, Joëlle Toledano

[34] Le changement digital c'est maintenant ! Georges Vialle Dans L'Expansion Management Review 2013/3 (N° 150)

Businesses and citizens alike need world-class, continent-wide digital infrastructure, such as very high-speed networks, cloud computing, high performance computing and big data. They also need digital skills, regardless of their sector of activity, which is what the GAFAMs can provide.

47. Despite this, the integration of digital technologies in companies remains low. Only 1.7% of companies in the EU fully use advanced digital technologies, while 41% do not use them at all.[35]

C. Supply chain disruption

48. Acquisitions can enable a company to achieve economies of scale by combining operations and reducing costs. In addition, the acquisition may also create synergies by allowing the company to integrate complementary products, technologies or skills into its existing portfolio. Ultimately, acquisitions will change business relationships.

1. Achieving economies of scale

49. The digital economy is particularly conducive to the emergence of economies of scale and network effects. The production of digital products or services often has large fixed costs, which are reduced as the quantities produced increase.[36]

50. This diversification dynamic is shared by all digital giants and can lead to a more or less strong competition between these companies. This is the case of Microsoft with the launch of the Xbox games console (2001) and then the Bing search engine (2011). This diversification has been supported by several takeovers of emblematic digital companies such as the company offering video conferencing tools Skype, NokiaMobile or the professional social network LinkedIn. In addition, since 2010, Microsoft has been developing a cloud solution (cloud information) for data storage offered to businesses, Microsoft Azure.[37]

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[35] Towards a digital single market: making the digital revolution an opportunity for Europe,Roberto Viola, Olivier Bringer In Revue d'économie financière 2017/1 (N° 125)

[36] Information Report n°4213 on the digital giants, June 2, 2021

[37] Ibid

51. Once established, these new entities become extremely difficult to dethrone. Such oligopolistic or even quasi-monopolistic positions can be economically efficient, leading to better products for consumers and lower prices. However, this assumes that new entry remains possible and credible. Unfortunately, research by OECD experts has shown that the rate of new entry has declined more rapidly in the digital sector than in other sectors. (**Appendix 3**).

52. Acquisitions can allow a company to eliminate or reduce competition in the market by integrating competing or complementary companies. By consolidating market players, the company can achieve economies of scale, resulting in lower production and operating costs. This cost optimisation can contribute to an increase in the company's profits. When profits increase, the value of the company also increases, which can generate shareholder value. Acquisitions can therefore be seen as a strategy to strengthen the company's position in the market and to create value for its shareholders.

2. Synergy creation

53. On the other hand, in the digital market sector there are often network effects, as consumers are attracted to a company that will provide access to a large network, which will further strengthen its market position.

Therefore, a merger-specific synergy requires that something new, which was not otherwise possible, is produced through the acquisition. For example, an innovative product that could not have been created or a cost saving that could not have been achieved if the two companies had not merged.[38]

54. One approach to increasing sales of a product is to ensure its interoperability [39]with the acquired product, as Facebook did with Instagram (while simultaneously removing interoperability from each product with Twitter). At the time, this action was not necessarily considered anti-competitive[40], as Facebook was not obliged to offer equal treatment between products from its

[38] OECD, Directorate for Financial and Enterprise Affairs, Competition Committee, Secretariat Background Note, 27 May 2020

[39] Interoperability is the ability to exchange information and mutually use exchanged information

[40] Statement by Meta, March 10, 2013 sent to AFP

own ecosystem and those from outside. However, the consequences of this choice, such as easier access to Instagram for Facebook members, are not evidence of pro-competitive synergies. Rather, it is an investment made by the acquired business (which is now a division of the acquirer), the opportunity cost of which is now borne by the acquirer rather than by the acquired business as an independent third party entity.

55. Taken to its extreme, this frequent concentration in digital markets gives rise to a "winner-takes-all" phenomenon, where the first company able to position itself and differentiate itself acquires a dominant position. This dynamic is reinforced by another closely related trend, described by the Postal and Electronic Communications Regulatory Authority (ARCEP) as the return of "strong conglomerate strategies" in sectors that may or may not be related to the initial activity. This diversification takes the form of the development of new products and services, as well as the acquisition of companies, including smaller start-ups, leading to the creation of complete ecosystems.

56. Acquisitions provide an opportunity for a company to expand its customer base by acquiring companies that have already established a loyal customer base. This allows the acquiring company to quickly enter new markets or market segments. By integrating the operations and resources of the acquired businesses, the company can expand its geographic reach, broaden its product or service range, or even diversify into new areas.

This expansion may help to stimulate the growth of the business by generating new sources of revenue and creating synergies between the different entities acquired. Access to new markets can also help the company to increase its market share, thereby strengthening its competitive position.

In addition, acquisitions can allow a company to benefit from the expertise and know-how of the acquired companies, by integrating their talent and resources. This can foster innovation, improve research and development capabilities, and accelerate the time to market for new products or services.

Overall, acquisitions can be a strategic strategy for a company to expand its presence, stimulate growth and increase market share by accessing new customers and markets.

Part 2-The control of killers acquisitions in the digital market

Chapter I - Ex-post regulation of mergers: not enough or too much deterrence of players in the digital market

57. Recently, the FTC used its powers to evaluate past mergers and requested information on hundreds of acquisitions made by the technology giants (GAFAM) over the last ten years. This raises the possibility of retroactive enforcement of merger control legislation. [41]

The FTC has stated that if the review reveals problematic transactions, all options will be considered, such as rescinding past mergers, requiring companies to create and divest a separate business entity, or imposing behavioural remedies.

58. Competition law is an exclusive competence of the European Union. Articles 101 to 109 TFEU and Protocol 27 on the internal market and competition provide that a system of undistorted competition is an integral part of the internal market. They are supplemented by Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings and Commission implementing Regulation (EC) No 802/2004.

In French law, Article L. 420-1 of the Commercial Code prohibits anti-competitive agreements, Article L. 420-2 prohibits the abuse of a dominant position and Articles L. 430-1 to L. 430-10 set out the rules governing mergers and the intervention of the Competition Authority.

A. Merger control : prohibition of transactions and financial penalties

1. By prohibit of the transaction

59. According to Article L 430-7 III of the French Commercial Code, "The Competition Authority may, in a reasoned decision: (i) either prohibit the merger and, where appropriate, order the parties to take all appropriate measures to restore sufficient competition; (ii) or authorise the merger and order the parties to take all appropriate measures to ensure sufficient competition or

[41]FTC press release, "FTC to Examine Past Acquisitions by Large Technology Companies", 11 February 2020

require them to comply with rules likely to make a sufficient contribution to economic progress to offset the harm to competition".

At European level, Article 102 TFEU provides that "the abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market insofar as it may affect trade between Member States".

60. In this way, both at national and European level, even if a merger could have passed under the radar of the regulatory authorities and the European Commission. This type of transaction will be sanctioned, as the competition authorities have gradually come to realise that ex-ante control has certain limitations. In particular, it has become apparent that certain transactions involving highly innovative emerging players could escape their control, given the low level of sales of the target.

If we look at the figures, we see that there are few prohibitions in practice[42] by the Competition Authority, and even fewer in the digital sector.

61. The prohibition on abuse of a dominant position provided for in the Treaties has made it possible to control a merger of undertakings with a non-Community dimension at national level and a posteriori since a recent judgment handed down by the CJEU in the Towercast case.[43]

In its judgment, the Court ruled that a merger with a non-Community dimension may be subject to review by the national competition authorities and the national courts on the basis of the direct effect of the prohibition on abuse of a dominant position laid down in EU law, using their own procedural rules to do so.

Consequently, the prior control of transactions with a Community dimension established by the Merger Control Regulation does not exclude subsequent control of concentrations that do not reach this threshold: certain concentrations may, at the same time, escape prior control and be subject to subsequent control.

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[42] cf **Appendix 4**

[43] Judgment of the Court of Justice in Case C-449/21 Towercast

2. By financial penalties

62. Order 2021-649 of 26 May 2021 transposes the ECN+ Directive with the aim of strengthening European integration and harmonisation in competition matters. Its objective is to provide national competition authorities with the necessary means of action to effectively punish infringements of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), including the possibility of imposing dissuasive financial penalties, whether through fines proportionate to the undertaking's turnover or the amount of the transaction.

In addition, the directive aims to further harmonise the penalties imposed by national competition authorities, taking into account the duration and seriousness of infringements. In addition to the adjustments required by the new legal framework, such as the elimination of economic damage and the application of a new penalty regime for professional organisations, the Authority is making a number of further adjustments. These adjustments are inspired by its own practice over the last ten years since the previous Notice[44], the case law of the supervisory courts and the practice of the European Commission, which is based in particular on its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 of 1 September 2006.

63. Current penalties are generally limited to financial fines, the amount of which is often not sufficiently dissuasive. Although these fines can represent up to 10% of the turnover of the company concerned, they are sometimes insufficient given the considerable financial resources of the main platforms in the sector. It is important to point out that giants such as Google, Amazon, Facebook and Apple collectively generate almost $700 billion in turnover every year. In some cases, these penalties can simply be absorbed as ongoing expenses as part of the overall budget of the platforms concerned.[45]

64. In the digital sector, there have been no sanctions to date. The Authority has been able to impose financial penalties on the Canal Plus Group in the television sector, as it did in 2011[46]. It

[44] Press release dated 16 May 2011

[45] Information report by the Committee on Economic Affairs on digital platforms n°3127, 24 June 2020

[46] Competition Authority, Decision No. 11-D-12 of 20 September 2011

notes that the Canal Plus Group has not complied with several commitments, some of which are essential, to which the decision taken by the Minister for the Economy in 2006 authorising the acquisition of TPS and CanalSatellite by Vivendi Universal and the Canal Plus Group was subject.

The Competition Authority therefore withdrew the decision to authorise the transaction, requiring the parties to re-notify the transaction within one month. The Authority noted the seriousness of the failings observed, which reflect negligence but also, more generally, a repeated lack of diligence and ill-will on the part of Canal Plus, as well as the extent of the harm that this failure is likely to cause to competition. It therefore imposed a fine of €30 million.

In the telecommunications sector, the Competition Authority recently imposed a fine of €75 million on Altice for failing to comply with orders to roll out fibre optics following its acquisition of SFR in 2014. This decision follows an initial penalty imposed by the Authority in 2017, when Altice was fined €40 million for failing to comply with its initial commitments. It should be noted that this decision represents the first time that the Competition Authority has used financial penalty payments.

65. In this way, it can be seen that sanctions are used only as a last resort in the event of non-compliance with behavioural or structural commitments. He points out that this type of penalty is not strictly speaking "autonomous". Furthermore, financial penalties are not sufficiently dissuasive, as they would be tantamount to granting the right to harm competition, which could be remedied at a later date, rather like the "polluter pays" principle in environmental law.

B. Curative measures for mergers: structural, behavioral remedies and injunctions

1. By Structural remedies

66. On the one hand, structural remedies essentially consist of the transfer of assets, amendments to contracts, licensing agreements or restrictions on commercial practices. These remedies may include measures aimed at reducing barriers to entry, encouraging the emergence of new competitors, guaranteeing interoperability or preventing discriminatory practices.

Structural remedies can nevertheless be a controversial issue, since dismantling a network would have an impact on users[47]. They would be faced with being scattered over several different networks and would try to find themselves on a single platform.

67. In this sense in the Microsoft/LinkedIn case[48], when Microsoft acquired LinkedIn in 2016, the European Union imposed structural remedies to ensure fair competition. Microsoft undertook to allow competitors fair access to LinkedIn's APIs, in order to prevent unfair exclusion of competitors and foster innovation in the professional social networking market.

In addition, in the Google/DoubleClick case[49], when Google acquired DoubleClick in 2007, the competition authorities, particularly in the United States and Europe, imposed structural remedies. Google undertook to put in place safeguards to prevent discrimination against competitors and to allow interoperability with other advertising platforms, in order to maintain a competitive environment in the online advertising market.

2. By behavioral remedies

68. On the other hand, behavioral remedies are designed to change the commercial behavior of undertakings or transform their internal organisation by implementing various measures[50]. For example, this may include modifying long-term contracts, opening up technologies, infrastructures, resources or networks to competition, or removing links with competitors. More widespread use of these behavioral remedies can enhance the effectiveness of competition law.

Behavioral remedies offer the advantage of being adaptive, reversible and proportionate. As the Competition Authority points out in its study on this practice[51], this type of remedy "makes it possible to quickly restore public economic order, whether in the area of anti-competitive practices

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47 TIROLE Jean, " Competition and the Industrial Challenge for the Digital Age ", Toulouse School of Economics, 3 avril 2020

48 European Commission (2016), Case No M.8124 - Microsoft/LinkedIn

49 European Commission (2008), Case n° COMP/M.4731 - Google/ DoubleClick

50 Information report by the Committee on Economic Affairs on digital platforms n°3127, 24 June 2020

51 Ibid

or mergers". However, they are not without their disadvantages because of the costs associated with monitoring them.

According to the study on behavioral commitments published by the Competition Authority, the latter accepts many behavioral commitments. From 2009 to 2018, 45% of the commitments accepted by the Authority were purely structural, 36% purely behavioral and 19% mixed.[52]
There has therefore been a decline in behavioral remedies, no doubt due to the European Commission's tendency to use structural remedies.

The Commission, through the DMA, will be able to adopt mainly behavioural corrective measures; structural corrective measures will only be used if the former are ineffective[53] or have an excessive effect compared with the adoption of a structural corrective measure.[54]

69. In a case relating to the acquisition of exclusive control of TPS and CanalSatellite by Vivendi SA and Canal Plus Group, the Authority significantly reduced the obligations imposed on Canal Plus in connection with the merger between Canal and TPS.[55]

The French Authority stands out in Europe for its frequent use of behavioural commitments.[56]
At European level, this type of remedy is rarely applied, as the Commission's doctrine favours structural remedies wherever possible. However, several recent reports criticise this choice and call for a change in European law to encourage greater use of these tools.

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[52] Étienne Chantrel, Assignment (concentration remedies), Dictionary of competition law, Concurrences, Art. No. 12147

[53] Article 16-2, “Market investigation of systemic non-compliance”, DMA proposal

[54] P. Bougette, F. Marty, What remedies for abuse of dominant position? An economic analysis of the decisions of the European Commission, Concurrences 2012, n° 3, p. 30-45

[55] Decision 17-DCC-92 of June 22, 2017

[56] cf **Appendix 4**

Chapter II- Ex ante regulation of mergers: a complement to competition law?

A. Assessment of mergers: notification and referral mechanisms

1. Notification of mergers

70. When a company is considering a merger, it must notify the competent regulatory authorities if it meets certain criteria. However, multiple notifications pose problems that are well known to experts[57]. This can lead to divergent analyses or even contradictory decisions by different authorities. In addition, there are differences in deadlines, working languages and specific national rules. It is not uncommon to have to notify an international transaction to more than a dozen authorities around the world.

In principle, the regulation offers a solution to this difficulty by proposing a supranational one-stop shop if the European thresholds are exceeded. If this is not the case, the transaction will be examined by one or more competent national authorities if the national thresholds are reached, or it may be carried out legally without any controls if no national thresholds are crossed.

Initially, the European thresholds were set at :
- 5 billion euros worldwide turnover for all parties;
- and at least €250 million achieved individually by two companies in the European Economic Area.
However, when the companies generate more than two thirds of their European turnover within one and the same Member State, the transaction falls under the jurisdiction of the national Competition Authority (and the law) of that State.

For the French thresholds, according to article L 430-2 of the French Commercial Code:
-The total worldwide turnover of all the States concerned is equal to or greater than €150 million.
-Total individual turnover in France is equal to or greater than €50 million
-Retail trade is subject to different thresholds: 1st threshold at €75 million and 2nd threshold at €15 million. However, intellectual services are excluded

[57] Report to the Minister of the Economy and Finance of Dec. 16, 2013, known as the Zivy Report, published on March 14, 2014.

-Derogatory thresholds in overseas collectivities: 1st threshold of €75 million and 2nd threshold of €15 million.

71. In general, the system of centralised regulation through the one-stop shop has undeniably simplified business by enabling companies to benefit from a single control procedure and a single final decision when they wish to carry out a major cross-border merger in Europe. However, the proportion of mergers notified to the European Commission has tended to decline since the early 2000s.[58]

However, recent sources of dissatisfaction have been highlighted by many business representatives and experts. Firstly, the increasing length of the informal "pre-notification" phase is considered excessive by companies and their advisers. In addition, the information requested by the merger review teams is often considered excessively burdensome.

In addition, the relative complexity of the referral mechanisms designed to facilitate interaction between the European Commission and the national competition authorities, although now more efficient than before, is sometimes perceived as a source of unnecessary formalities, additional delays, legal uncertainty and even excessive bureaucracy.

Finally, despite the efforts made over the last 15 years to carry out a so-called "more economic" analysis of the actual or potential anti-competitive effects of proposed mergers, the assessment of the efficiency gains that could offset these anti-competitive effects can sometimes give rise to misunderstandings among companies and their economic and legal advisers.

2. The granting of an upstream or downstream merger referral

72. It is possible for there to be a referral from the Commission to the NCA, a top-down referral, but also a referral from the NCA to the Commission, a bottom-up referral, pursuant to Article 22 of Regulation 139/2004.

[58] cf **Appendix 5**

73. By making it possible to avoid a much larger number of national "multiple notifications", this upward and downward referral mechanism is proving to be a success. However, the current effectiveness of the "multi-jurisdictional" system must be qualified.

The first, quantitative, reason is the large proportion of cases that are still dealt with by several national competition authorities. Upstream and downstream referral mechanisms can be complex, entailing additional administrative formalities for the parties involved and potentially lengthening deadlines. This can create a degree of legal uncertainty and increase the administrative burden for businesses.

The second reason, also quantitative in nature, is the resulting multiplication of procedures. Coordination between national authorities and the European Commission can be a challenge due to differences in procedures, languages and priorities. This can lead to friction and complex coordination between the different parties involved.

The final reason is of a more qualitative nature: the continued existence of a large number of "multi-notifications", year after year, not only undermines the objective of consistent implementation of competition rules, equal treatment and legal predictability that was at the root of the creation of the European "one-stop shop" in 1989.
This fragmentation of merger control is also, and ultimately above all, a source of difficulties for all stakeholders. Referrals can lead to differences in interpretation and assessment between the European Commission and national authorities. This can create uncertainty for stakeholders and lead to contradictory decisions in different countries.

74. There may be positive effects, in that cooperation and coordination may emerge from relations between the European Commission and the national competition authorities. This leads to better harmonisation of decisions and a more consistent approach to the assessment of cross-border mergers.

In addition, there has been a sharing of workload, with upward referrals allowing the European Commission to delegate certain cases to national authorities, thereby reducing the workload and allowing more efficient management of resources. Similarly, top-down referrals allow national

authorities to deal with mergers that do not meet the EU notification thresholds, thus easing the burden on the Commission.

Finally, national authorities have in-depth expertise of local markets and national specificities, which can contribute to a more accurate analysis of merger effects on these markets.

75. To illustrate this practice, reference may be made to the merger between Apple and Shazam. On 11 December 2017, Apple announced that it had signed an agreement to acquire Shazam.Given its limited turnover, the transaction was not notifiable at European level. In the European Union, it was apparently notifiable only in Austria. However, this Authority made a referral request to the European Commission under Article 22 of Regulation (EC) 139/2004 on the control of concentrations between undertakings.

The Commission received the referral request and will rule on the merger in what is known as a "phase 2" procedure, i.e. a very detailed analysis of the merger. It will authorise the merger, but will carry out a very detailed analysis of the takeover.

During Phase II, the Commission assesses the potential efficiencies that could arise from the merger of the companies. If the positive impact of these efficiencies on consumers outweighs the negative effects of the merger, the merger can be approved. However, certain conditions must be met for these efficiencies to be considered.
Firstly, the claimed efficiencies must be verifiable, meaning that the Commission must have reasonable certainty that they will indeed occur and be significant. Secondly, these efficiencies must be specific to the merger, meaning that they cannot be achieved through other methods besides the merger itself. Lastly, it is essential that these efficiencies are likely to benefit consumers and not solely retained by the merging companies. The burden of proof lies with the merging companies to demonstrate that these conditions are fulfilled.[59]

76. The Authority has proposed on several occasions to remedy this shortcoming by using the referral mechanism provided for in Article 22 of Regulation 139/2004, without amending the existing legislation. It therefore welcomed the European Commission's announcement in 2020

[59] Healey Deborah, Kovacic William, Trevisán Pablo, Whish Richard , *Global Dictionary Of Competition Law*(eds.)

that it would henceforth accept that national competition authorities refer sensitive mergers for review, even if they do not meet the criteria for reviewability at national level.

This new approach to Article 22[60] will enable this tool to be used more effectively at European level, and will contribute to better control of acquisitions of high-value companies, particularly in the areas of digital innovation.

B. The various phases of merger investigations: from preliminary examination to authorisation

1. Prior examination of mergers

77. Of the 8,480 transactions[61], no fewer than 7,549, or 89%, were authorised unconditionally at the end of phase I of the investigation, which lasts a maximum of 25 working days in principle. Although the notification requirement may seem onerous for the companies concerned, it is offset by the distributive effect of the Regulation: the transaction is globally authorised in the 27 Member States of the European Union and in the countries of the European Economic Area (EEA). Member States may not impose any additional conditions on the transaction under their national competition law.

Of these transactions, 4,373 were subject to a simplified procedure, which is available for transactions that do not raise any competition concerns, even if they exceed the turnover thresholds. These cases concern situations where the parties involved do not operate, or operate only to a limited extent, on the same markets upstream or downstream of their respective markets.
These statistics seem to indicate that the European Commission is not criticised for 'false negatives' or for an excessively interventionist approach in these cases. However, this does not necessarily guarantee absolute speed in the processing of mergers.

78. On 20 April 2023, the Commission adopted a package of measures aimed at further simplifying its merger control procedures under the EU Merger Regulation[62].The package aims to deliver

[60] Application in the Grail/Illumina case, September 6, 2022

[61] Philippe Corruble, European merger control put to the test by the Digital Economy

[62] IMPLEMENTING REGULATION (EU) /... implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings and repealing Commission Regulation (EC) No 802/2004

considerable gains for companies and their advisers in terms of preparatory work and associated costs. It aims to simplify and broaden the scope of the Commission's review process for non-problematic mergers (also known as "short-form" transactions). It also aims to reduce the volume of information to be provided when notifying a transaction and to optimise the transmission of documents. The new rules will apply from 1 September 2023.

The new rules will expand the number of transactions that can be processed under the simplified procedure and streamline the examination of transactions that are subject to the simplified procedure and those that are not. Lastly, they will optimise the transmission of documents to the Commission.

79. During the examination of the acquisition of WhatsApp in 2014, Facebook assured the European Commission that it was technically impossible to automatically merge the accounts of Facebook and WhatsApp users.

However, two years later, it emerged that this statement contradicted the technical reality well known to the company's engineers, when Facebook began integrating the two platforms and linking users' accounts simply by using phone numbers through an algorithm. In 2017, the European Commission responded by fining Facebook €110 million for providing incorrect information during the investigation.

Although this fine may seem insignificant in relation to what is at stake, this example highlights the administrative Authority's lack of autonomy in technical terms, as well as the crucial importance of this investigation phase.

2. Clearances

80. Once a transaction has been notified to the Commission, the latter has 25 working days in Phase I to study the effects of the transaction. At the end of this period, the Commission has three options: to clear the transaction unconditionally, to clear it with commitments or to open a "Phase II", if the transaction presents risks for competition in the common market. At the end of this second period, the Commission may authorise the transaction subject to conditions, or refuse to authorise it. In the latter case, the parties will have to appeal to the European judge at

the General Court of the European Union. The European procedure is thus administrative from start to finish, from notification to final decision.

81. Whether it is the competition authority, which in general issues authorisations without conditions, approximately 262,[63] or the European Commission, approximately 171 since 1990,[64] there is therefore a certain tendency to issue authorisation decisions under phase I .

Although the vast majority of decisions do not raise competition concerns (on average 96.4% of decisions over the period 2013-2016 are authorisations without commitments), these results are fairly close to those of the European Commission.[65]

[63] cf. **Appendix 4**

[64] cf. **Appendix 1**

[65] Public consultation Competition Authority, 20 October 2017

Conclusion

82. In conclusion, killer acquisitions in the digital sector have become a growing concern for competition and economic regulation. Dominant players in the digital market often use these practices to eliminate competition, maintain their dominant position and restrict innovation. This raises concerns about effective competition, consumer choice and data protection.

83. Competition authorities and regulators have recognised these challenges and are seeking to strengthen their tools and approaches to detect, prevent and sanction predatory takeovers. Information Report 755 of the Economic Affairs Committee proposes various measures to combat these practices, such as improved coordination between the Competition Authority and the European Commission, the introduction of notification of acquisitions with a high market value but below the turnover thresholds, and further reform of European merger control law.

84. In addition, the Digital Markets Regulation (DMA) was adopted to regulate the operation of large digital platforms and promote fair competition. The DMA imposes specific obligations on dominant players, including prior notification of acquisitions, in order to prevent anti-competitive practices.

85. However, it is important to stress that the fight against predatory takeovers in the digital sector requires a multidimensional and evolving approach. Rapid technological developments and complex competitive dynamics[66] make it necessary to constantly monitor and adapt regulations.

86. In addition, it should be recognised that certain acquisitions in the digital sector can have beneficial effects, such as consolidating acquisitions. Such acquisitions can enable companies to improve their competitive position, broaden their product or service offering, and gain access to new technologies or expertise.

87. Consolidating acquisitions, as we have seen, can promote market consolidation, which can lead to a better allocation of resources, lower costs and improved operating efficiency. They can also

[66] cf. **Appendix 6**

contribute to the creation of synergies between the different entities acquired, which can lead to benefits in terms of product development, research and development, or knowledge sharing.

Nevertheless, it is essential to note that the beneficial effects of killer acquisitions must be carefully assessed and balanced against competition and consumer protection considerations. The potential benefits of such acquisitions must not be used as a pretext to justify anti-competitive practices or the creation of monopolies that are detrimental to innovation and the diversity of players.

88. With regard to killer acquisitions in the digital sector, there is a residual approach of a continuous search for innovative solutions to preserve a healthy competitive environment and promote innovation. Thus, in regulating predatory takeovers, it is necessary to strike a balance between promoting economic efficiency and preserving a healthy competitive environment.

This could include enhanced international cooperation between competition authorities, the use of advanced technologies such as artificial intelligence to detect predatory takeover signals, and the encouragement of an entrepreneurial culture favouring the diversity of players and the emergence of new competitors.

89. Ultimately, the fight against predatory takeovers in the digital sector is crucial to ensuring fair competition, protecting innovation and safeguarding consumer interests. This requires collective action by competition authorities, regulators, legislators and industry players to create an environment conducive to dynamic competition and continuous innovation in the digital field.

Appendix 1: Analysis of merger operations by the European Commission

I.) NOTIFICATIONS

	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	09	10	11	12	13	14	15	16	17	18	19	20	March 21	Total
Number of notified cases	11	64	59	59	95	110	131	168	224	276	330	335	277	211	247	318	356	402	348	259	274	309	283	277	303	337	362	380	414	382	361	121	8083
Cases withdrawn - Phase 1	0	0	3	1	6	4	5	9	5	7	8	8	3	0	3	6	7	5	10	6	4	9	4	1	6	6	8	7	10	12	7	1	171
Cases withdrawn - Phase 2	0	0	0	1	0	0	1	0	4	5	5	4	1	0	2	3	2	2	3	2	0	1	1	0	0	2	1	2	2	0	2	2	48

II.) REFERRALS

	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	09	10	11	12	13	14	15	16	17	18	19	20	March 21	Total
Art 4(4) request (Form RS)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	14	13	5	9	8	6	10	13	11	16	13	16	13	8	12	15	7	191
Art 4(4) referral to Member State	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	11	13	5	9	6	7	10	12	9	14	12	11	14	6	9	17	5	172
Art 4(4) partial referral to Member State	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	1	0	2	0	2	4	1	0	2	1	3	17
Art 4(4) refusal of referral	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Art 4(5) request (Form RS)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	20	28	38	51	23	23	26	18	22	13	19	20	23	15	15	16	15	8	393
Art 4(5) referral accepted	0	0	0	0	0	0	0	0	0	0	0	0	0	0	14	26	39	49	22	26	24	17	22	11	19	19	22	15	15	16	16	8	380
Art 4(5) refusal of referral	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	0	0	2	0	0	1	0	1	0	0	1	0	0	0	0	0	0	7
Art 22 request	0	0	0	1	0	1	2	1	0	0	0	0	2	1	1	4	4	3	2	1	3	1	3	1	1	1	0	2	3	2	1	2	43
Art 22(3) referral (Art 22. 4 taken in conjunction with article 6 or 8 under Reg. 4064\89)	0	0	0	1	0	1	2	1	0	0	0	0	2	1	1	3	3	2	3	1	2	2	2	1	1	1	0	1	3	3	1	1	39
Art 22(3) refusal of referral																1	1	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0	4
Art 9 request	0	1	1	1	1	0	3	7	4	9	4	9	8	10	4	7	6	3	5	3	11	2	2	2	2	3	3	2	5	3	3	0	124
Art 9.3 partial referral to Member State	0	0	1	0	1	0	0	6	3	2	3	6	7	1	1	3	1	1	2	0	3	0	1	0	0	1	1	0	1	1	0	0	46
Art 9.3 full referral	0	0	0	1	0	0	3	1	1	3	2	1	4	8	2	3	1	1	2	1	4	2	1	0	0	0	0	0	3	0	4	0	48
Art 9.3 refusal of referral	0	1	0	0	0	0	0	0	0	1	0	0	0	1	0	0	0	1	0	1	1	0	0	0	3	3	1	1	1	0	0	0	15

III.) FIRST PHASE DECISIONS

	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	09	10	11	12	13	14	15	16	17	18	19	20	March 21	Total
Art 6.1 (a) out of scope Merger Regulation	2	5	9	4	5	9	6	4	4	1	1	1	1	0	0	0	0	0	0	0	0	0	0	0	1	1	1	0	0	0	1	0	56
Art 6.1 (b) compatible	5	47	43	49	78	90	109	118	196	225	278	299	238	203	220	276	323	368	307	225	253	299	254	252	280	297	327	353	366	343	334	115	7170
Art 6.1(b) compatible, under simplified procedure (figures included in 6.1(b) compatible above)	0	0	0	0	0	0	0	0	0	0	41	141	103	110	138	169	211	238	190	143	143	191	171	166	207	222	246	280	302	283	278	93	4066
Art 6.1 (b) in conjunction with Art 6.2 (compatible w. commitments)	0	3	4	0	2	3	0	2	12	16	26	11	10	11	12	15	13	18	19	13	14	5	9	11	12	13	19	18	17	10	13	3	334

IV.) PHASE II PROCEEDINGS INITIATED

	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	09	10	11	12	13	14	15	16	17	18	19	20	March 21	Total
Art 6.1 (c)	0	6	4	4	6	7	6	11	11	20	18	21	7	9	8	10	13	15	10	5	4	8	10	6	8	11	8	7	12	8	8	1	282

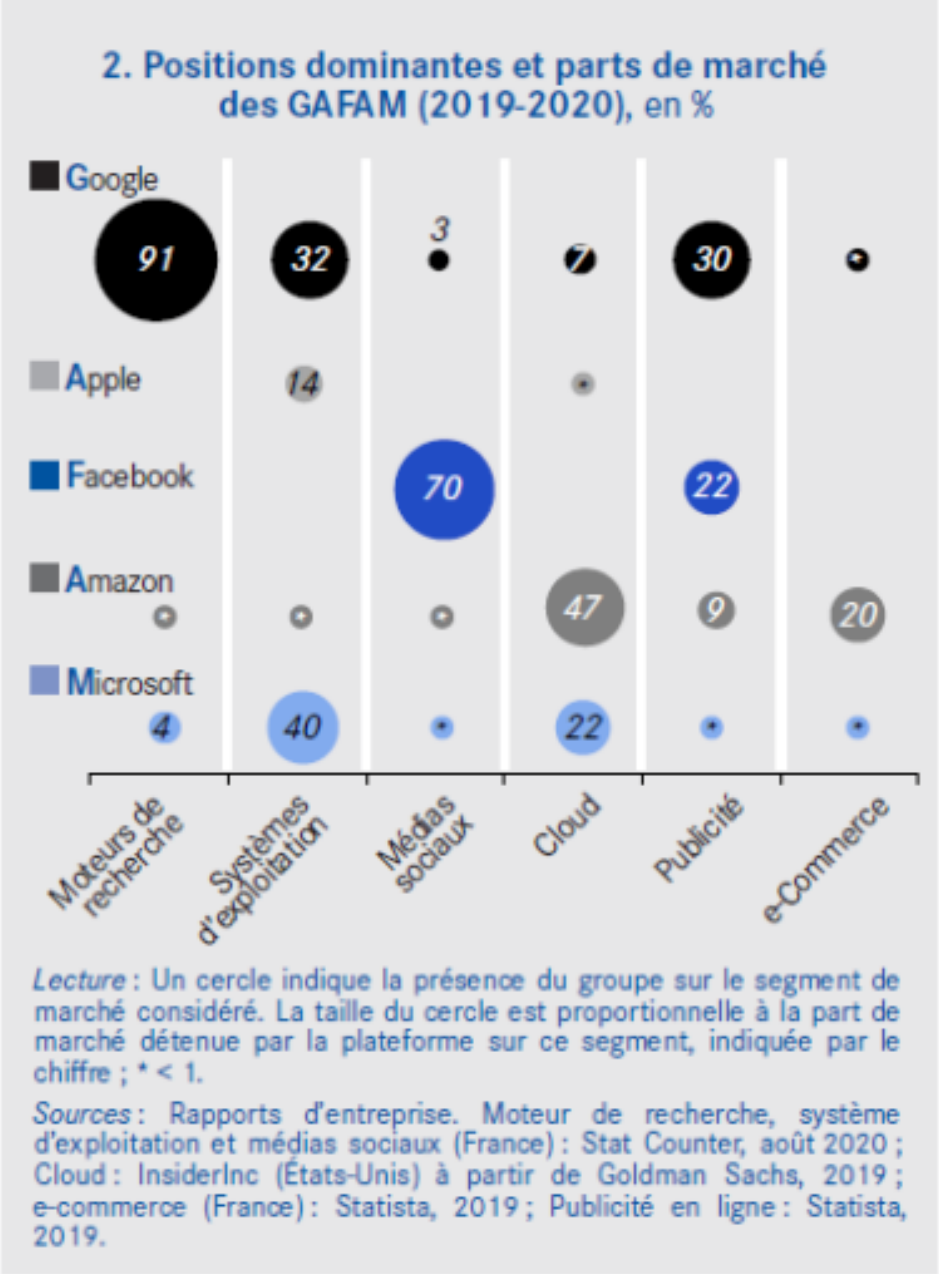
V.) SECOND PHASE DECISIONS

	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	09	10	11	12	13	14	15	16	17	18	19	20	March 21	Total
Art 8.1 compatible (8.2 under Reg. 4064/89)	0	1	1	1	2	2	1	1	3	0	3	5	2	2	2	2	4	5	9	0	1	4	1	2	2	1	1	0	4	0	1	0	63
Art 8.2 compatible with commitments	0	3	3	2	2	3	3	7	4	7	12	9	5	6	4	3	6	4	5	3	2	1	6	2	5	7	6	2	6	6	3	3	140
Art 8.3 prohibition	0	1	0	0	1	2	3	1	2	1	2	5	0	0	1	0	0	1	0	0	0	1	1	2	0	0	1	2	0	3	0	0	30
Art 8.4 restore effective competition	0	0	0	0	0	0	0	2	0	0	0	0	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	5

VI.) OTHER DECISIONS

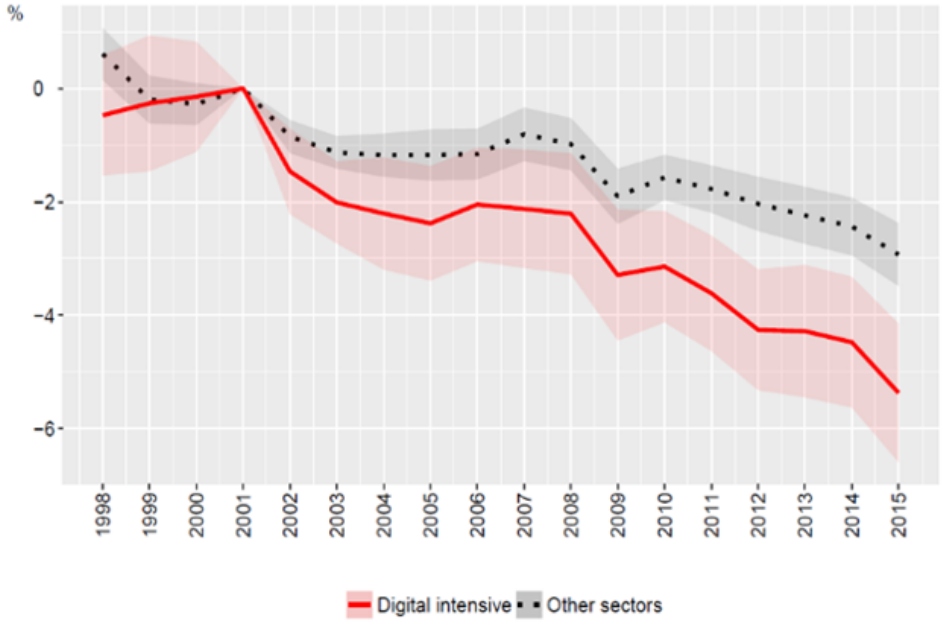
	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	09	10	11	12	13	14	15	16	17	18	19	20	March 21	Total
Art 6.3 decision revoked	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
Art 8.6 decision revoked	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Art 14 decision imposing fines	0	0	0	0	0	0	0	0	1	4	1	0	1	0	1	0	0	0	0	1	0	0	0	0	1	0	0	1	1	2	0	0	14
Art 7.3 derogation from suspension (7.4 under Reg. 4064/89)	1	1	2	3	3	2	4	5	13	7	4	7	14	8	10	6	2	3	6	5	1	3	2	1	1	1	0	5	5	1	3	0	129
Art 21	0	0	0	0	0	1	0	1	0	1	1	0	1	0	0	0	2	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	8

Appendix 2 : GAFAM dominance and market share in 2019-2020



Source : Conseil d'analyse économique, octobre 2020

Appendix 3: The entry rate into digital-intensive sectors



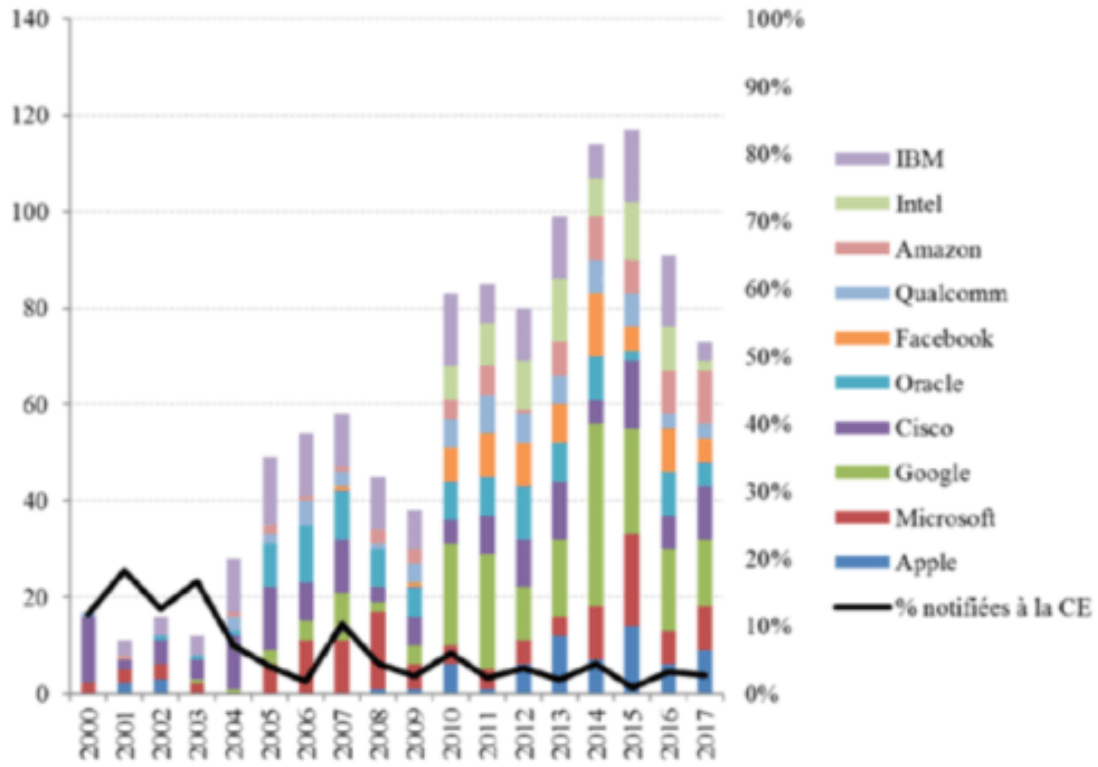
Source : Calvino et Criscuolo, OCDE 2019

Appendix 4 : Mergers analyzed by the French Competition Authority

Concentrations

Autorisations sans engagements	261
Autorisations sous réserve de mise en œuvre d'engagements	10
Autorisation sous réserve de mise en œuvre d'injonctions	0
Décisions d'inapplicabilité du contrôle	0
Décision d'interdiction	1
Total	272

Appendix 5 : Listed mergers vs. mergers notified to the European Commission (in number of transactions)



Sources : Fondation pour l'innovation politique, novembre 2018

Appendix 6 : List of the most notable tech sector acquisitions in 2023

- January 18: Bitwarden acquires Passwordless.dev
- February 1: Netify takes over the Gatsby platform
- February 5: Flight GPS purchased by Black Mountain Investment Group
- February 8: HID acquires Guard RFID
- February 9: NuVasive acquired by Global Medical for $3.2 billion
- February 9: Sumo Logic acquired by Fransisco Partners $1.7 billion
- February 9: Meta acquires Within
- February 9: takeover of Captain Wallet by SendinBlue
- February 16: Zopa acquires DivideBuy
- February 22: Amazon signs the acquisition of One Medical for 3.8 billion euros
- March 14: Momentive Global acquired by Symphony Technology Group for $1.5bn
- March 15: BlaBlaCar announces the planned acquisition of the start-up Klaxit

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