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Lessons from the Big Tech Mergers: Examining the Commission's Ability to Identify & Assess Killer Acquisitions in the Light of the New Guidelines for Article 22 EUMR

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Abstract

This paper investigates the FAAMG companies' acquisitions and Commission's competitive assessments in the technology sector as well as the Commission's ability to identify and assess killer acquisitions. Tech acquisitions are often reviewed traditionally based on the financial aspects when the digital markets are fast changing, and often driven by innovation. After the renovation of the referral procedure and the DMA, there will be an increased number of acquisitions referred to the Commission for review. The new guidelines for Article 22 EUMR enable almost any transaction to be reviewed by the Commission regardless of the turnover thresholds which were the parameter for review prior to the renovation of the mechanism. When the target firm's importance can be reflected in its innovation rather than its turnover, are the traditional, financial based methods still applicable and efficient when reviewing the mergers? The Commission's decisions show that the focus of the investigations has often been elsewhere than in the innovation of the target firm and the necessary analysis of the potential harm to innovation seems to be yet not incorporated in the competitive assessment comprehensively. Should the focus of the assessment be shifted in the future to appropriately examine big tech mergers? Would the shift of the focus towards innovation bring problems of uncertainty? The renovation of the referral mechanism looks for a solution to the phenomena of killer acquisitions where incumbent firms target nascent firms with low turnover and often innovative technology to renew their business or strengthen their position in the markets by killing off the competition. Is the Commission able to recognize a killer acquisition when reviewing one and assess it appropriately through its competitive assessment if the focus is elsewhere than in the innovation?

Keywords: M&A, FAAMG, technology sector, EUMR, competition law, dominance, data collection, innovation, killer acquisitions, mergers

1. Introduction

The leading technology players Meta (Facebook before), Apple, Amazon, Microsoft, and Google are actively acquiring companies. These companies' have managed to grow a large ecosystem of products, applications, services, content, and users.[1] These companies that go by the name "The Big Five" as well FAAMG, are players in the digital markets which can be characterized by being fast changing and often innovation driven. Moreover, there is a trend towards creation and development in the technology sector.[2] This paper will investigate some of the mergers of these players investigated by the European Commission ("The Commission" from now on). The focus is on the issues the Commission has assessed in its decisions concerning the mergers. The paper will analyze the competition concerns of the Commission and discuss whether the innovation driven digital markets should impact the way the competitive assessment is conducted in the future by changing the approach. The competitive assessments of the acquisitions are analyzed by covering certain relevant aspects such as dominance in the market, data collection, and impact on competitors. Furthermore, the shift of the paper moves forward to assess the innovation concerns and conducts an analysis of the effectiveness of the merger reviewing procedure in the creative digital markets as it is now as well as discusses the Commission's new guidelines for Article 22 EU Merger Regulation ("EUMR" from now on) which allow transactions to be referred to the Commission for review based on the substantive value of the target company rather than its turnover.

The paper aims to answer the following questions: What lessons can be learned from the Commission's investigations concerning big tech mergers? In the light of the new guidelines for Article 22 EUMR, is the Commission

[1] Turgot, C. (2021). Killer acquisitions in digital markets: evaluating the effectiveness of the eu merger control regime. European Competition and Regulatory Law Review (CoRe), 5(2). P. 1-2.
[2] Robertson, V. (2022) Merger review in digital and technology markets: Insights from national case law. Final Report. European Commission. (27) P. 21.

able to recognize killer acquisitions and assess them appropriately? Should the Commission change its approach towards the competitive assessment in the digital markets and put its focus on innovation more in the future? Therefore, the objective of the paper is to analyze the Commission's assessments in tech mergers of large technology players and identify what is relevant in the context of future tech mergers in addition to providing a discussion on the approach of the Commission. The new guidelines for Article 22 EUMR and killer acquisitions are brought to the equation after the analysis of the Commission's competitive assessments as regards to the investigated acquisitions. The innovation aspect is raised up and the concerns around the subject are discussed in the context of relevant legislation and literature. The focus it put on the traditional assessment of tech mergers and whether the innovation and increased number of referred transactions to the review will create the need to approach the future tech mergers differently and what are the challenges as regards to that.

The answers to the research questions are formed through qualitative methods as well as legal analysis. The Commission's decisions are analyzed with supporting literature. The objective of the research is to investigate transactions where the acquiring company is one of the FAAMG companies. The reasons behind choosing the FAAMG companies for this research are that the big tech companies are engaging in frequent acquisitions of other companies as well as their position in the technology industry. Therefore, the Commission's decisions concerning big tech mergers are chosen by their relevance and limited to ten cases. The research is limited to examining what can be learned from the Commission's decisions as well as assessing the effectiveness of the merger reviewing procedure in the light of killer acquisitions and the new guidelines for Article 22 EUMR. The method for the assessment is based on the conclusions made from prior merger decisions as well as relevant legislation and literature. Future possibilities are discussed in the light of the research conducted.

The second part of this paper is a background chapter providing general information of this specific topic. Firstly, competition, market power, and technology companies are discussed in the general sense and the appropriate legislative framework is provided. Additionally, the traditional theories of harm are discussed briefly. This section provides a foundation for the following research as well as the relevant legislative framework. The second part of the background chapter is highly relevant regards to the objective of this paper. This chapter introduces killer acquisitions and innovation concerns around the phenomena which will be discussed more in-depth further on in this paper. Furthermore, the new guidelines for Article 22 EUMR are introduced in addition to providing a short summary of the first transaction reviewed under the new guidelines, the transaction between Illumina/GRAIL. Killer acquisitions and the new guidelines for Article 22 EUMR are brought together with the Commission's competitive assessments and innovation in the fifth chapter as well as analyzed in the light of the research questions.

The third part of this paper concerns the acquisitions made by the FAAMG companies, Google, Microsoft, Amazon, and Apple. The acquisitions are chosen by their relevance as well as visibility and limited to ten transactions. The acquisitions investigated from Google are the following: Google/DoubleClick, Google/Fitbit, and Google/Motorola Mobility. Furthermore, the acquisitions discussed by Microsoft are Microsoft/Linkedin, Microsoft/Skype and Microsoft/GitHub. From Amazon, Meta, and Apple, the acquisitions discussed are Amazon/MGM, Meta/Kustomer, Facebook/WhatsApp, and Apple/Shazam. The acquisitions are summarized in short sections providing background, summary of the Commission's assessment as well as the decision whether the acquisition was cleared by the Commission. Here, all the acquisitions investigated were approved by the Commission. The relevance of this section is to provide summaries of the transactions before focusing on the Commission's assessments concerning specific competition issues which will be analyzed more in-depth in the next chapter since in the technology sector, the acquisitions often include technical

information which must be acknowledged to a certain level to further understand the assessment of different aspects of the transactions.

The fourth part of this paper focuses on the Commission's assessment concerning the acquisitions laid down in the third chapter. The chapter conducts an analysis of the Commission's approach concerning the acquisitions focusing on four specific issues which are the following: dominance in the market, data collection, potential and actual impact on competitors as well as innovation concerns. The focus is on identifying the Commission's approach towards certain competition concerns. All the acquisitions are not discussed under each concern. The acquisitions discussed under a specific concern are the ones where the Commission's assessment in the context of that concern is relevant and whether it was examined in the Commission's decision. Different competition concerns are analyzed and furthermore, a sub-chapter including a discussion of the Commission's assessments is provided. Since the FAAMG companies create a large and eminent part of the technology sector, their acquisitions have an inevitable impact on the technology sector.

The fifth chapter of the paper focuses on killer acquisitions, innovation, and the new guidelines for Article 22 EUMR. The implications of the new guidelines for Article 22 EUMR are analyzed in the context of innovation. Furthermore, the Commission's capabilities of catching killer acquisitions are investigated as well as the effectiveness of the Commission's competitive assessments in the digital markets through the Commission's assessments examined in the fourth chapter as well as relevant literature. The chapter brings together the examined tech mergers and the larger issue and aims to identify a gap in the Commission's examinations. The section aims to analyze whether there are already recognized ways to assess digital mergers appropriately with the focus on innovation and what are the problems arisen from those.

The last chapter is the conclusion based on the findings. This part aims to conclude the findings and draw the lines straight. The part includes a discussion concerning the implications of the findings which goes into more in-depth on what the results of this paper will imply for the future and provides final thoughts of the topic. The conclusion will be focusing first, on what can be learned from the Commission's investigations concerning big tech mergers. Furthermore, the discussion moves forward towards the future acquisitions taking into consideration the new guidelines of Article 22 EUMR as well as killer acquisitions and innovation concerns. Therefore, the conclusion aims to connect all the different aspects investigated in this paper, the Commission's competitive assessments of the mergers examined in the fourth chapter, the new guidelines for Article 22 EUMR, and the effects of the renovation of the referral mechanism in the context of tech mergers and whether killer acquisitions are a recognized and are they caught in the Commission's review appropriately. Here, all the aspects will be considered from the perspective of fast changing and innovative digital markets with the focus on innovation. Moreover, the conclusion aims to discuss whether the Commission can recognize and catch killer acquisitions appropriately through its assessments. Regardless of the new guidelines for Article 22 EUMR and the extension to the Commission's power to review mergers that to not provoke the turnover thresholds, does the Commission have the ability to assess the mergers to secure effective competition and catch killer acquisitions in the technology sector through its competitive assessment?

2. Background

The following will provide background and foundation for the investigation conducted in this paper. Firstly, competition, market power, and technology companies are discussed in the general sense. The relevant legislative framework as well as theories of harm for digital mergers are discussed. Furthermore, the already investigated competitive effects of big tech mergers are discussed shortly. The second part will introduce the phenomenon of killer acquisitions. Killer acquisitions and innovation in the technology sector are discussed in the general sense at this stage of the paper. The innovation concerns around tech acquisitions are significant in the context of this paper and will be discussed in the light of the transactions investigated in the chapter 4 as well as with killer acquisitions in the chapter 5. Lastly, this chapter will discuss the new guidelines for Article 22 EUMR and shortly the Digital Markets Act (The DMA from now on). The renovation of the referral mechanism is significant considering in the context of the analysis of the effectiveness of the referral mechanism and innovation conducted in the 5th chapter of this paper. The transaction between Illumina and GRAIL is introduced regardless of the fact that it is in the pharmaceutical sector since it was the first one that was blocked by the Commission in accordance with the new guidelines for Article 22 EUMR and therefore provides an important precedent. Therefore, it provides an important example showing that the Commission might take a stricter approach towards some transactions which are referred for review under the new guidelines. However, the transactions always require case by case examination to be assessed appropriately.

2.1. Competition, market power, and technology companies

Competition encourages firms to provide consumers products and services as well as efficiency, innovation, and it reduces prices.[3] There are multiple benefits of competition, greater efficiency than what would be obtained under a monopoly conditions, new technologies, products as well as methods of production.[4] Therefore, it is important to aim to secure effective competition in the markets. For competition to be effective, companies are required to act independently of each other and subject to the pressure applied by competitors.[5] Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) are the core of the EU antitrust policy.[6] Article 101 prohibits anti-competitive agreements between two or more independent market operators and Article 102 prohibits abusive behavior by companies holding a dominant position on any given market.[7]

Competition law comes in question, when the problem arises that one or more companies possesses, or will possess post-merger, market power.[8] The concept of 'dominant position' is significant here. Article 102 of the TFEU defining 'dominant position' equates to the economic concept of 'substantial market power'.[9] There are three core issues that are essential for the assessment of market power.[10] *The Guidance on the Commission's Enforcement Priorities in Applying Article 102 TFEU to Abusive Exclusionary Conduct by Dominant Undertakings* summarizes the three central issues which are the following: "*constraints imposed by the existing supplies from, and the position on the market of, actual competitors, constraints imposed by the credible threat of future expansion by actual*

[3] European Commission. Competition Policy. Antitrust.
[4] Whish, R & Bailey, D. 2021. Competition Law. 10th edition. P. 6.
[5] European Commission. Competition Policy. Antitrust.
[6] Ibid.
[7] Ibid.
[8] Whish, R & Bailey, D. 2021. Competition Law. 10th edition. P. 22.
[9] Ibid.
[10] Ibid.

competitors or entry by potential competitors and constraints imposed by the bargaining strength of the undertaking's customers."[11] Therefore, actual competitors, potential competitors, and countervailing buyer power are significant in the assessment of market power.

The main legislative framework for merger decisions is the EUMR.[12] The EUMR contains the main rules for the assessment of concentrations and the Implementing Regulation concerns the procedural issues such as notification, deadlines, etc.[13] Furthermore, important for the assessment of mergers are the Commission's notices as well as guidelines. These have a significant role in the interpretation of the EUMR and can produce legal effects.[14] However, notices are not binding, and guidelines are rules of practice, rather than rules of law.[15] The guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings are relevant in the light of the research conducted in this paper.[16] Effective competition is important since it brings benefits including quality products, low prices, and innovation.[17] The concept of "increased market power" refers to the ability of a firm to increase prices and diminish innovation inter alia.[18]

During the past few years there has been an increasing amount of big tech mergers. With the acquisitions made by the FAAMG companies, the numbers speak for themselves.[19] The question of increasing market power in the digital markets of certain players have been under discussion among the governments.[20] In the setting provided in article *"Big tech mergers"* written by Massomo Motta and Martin Peitz, the following is provided: when a start-up firm is able to develop a project that can possibly succeed, the merger is

[11] Ibid.
[12] European Commission. Competition Policy. Mergers Legislation.
[13] Ibid.
[14] Ibid.
[15] Ibid.
[16] Eur-Lex. Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings.
[17] Ibid. 8.
[18] Ibid.
[19] Motta, M, Peitz, M. (2021) Big tech mergers. Information Economics and Policy 54. P. 1.
[20] Ibid.

anti-competitive and when a start-up would be unable to develop a project without the merger, the merger is considered as pro-competitive.[21] During the recent years the start-up companies with a low turnover but high innovative importance has been targeted by the large technology companies.[22] This raises the phenomenon of killer acquisitions, which will be discussed more in-depth further on in this paper.

The substantive test for EU merger control, the SIEC ("significant impediment of effective competition") test is discussed briefly in the following. The test leaves the Commission to assess whether a concentration would significantly impede effective competition, resulting from the creation or strengthening of a dominant position in the market or a substantial part of it.[23] Furthermore, the SIEC test goes beyond the concept of dominance.[24] Nevertheless, the test is designed to capture transactions that does not necessarily create or strengthen a dominant position but still cause an impeding to the competition such as price increases post-merger.[25]

The Commission has adopted a package to simplify its procedures for reviewing concentrations under the EUMR in 2023. This package includes a revised Merger Implementing Regulation, a Notice on Simplified Procedure, and a Communication on the transmission of documents.[26] The main changes of the 2023 merger simplification package are the following.[27] First, expand and/or clarify which cases can be treated under the renewed procedure.[28] Second, streamline the review of simplified cases.[29] The Implementing regulation provides a new notification form including multiple-choice

[21] P. 2.
[22] Hutchinsona, C, Treščákováb, D, Berdnikovac, A, Samorodeskiid, D, Lobanovd, D, Stanislava, S. (2023) Big tech's acquisition challenge to EU merger control. European Competition Journal. P. 1.
[23] Concurrences. Antitrust Publications & Events. Test SIEC (Merger)
[24] Ibid.
[25] Ibid.
[26] European Commission. Mergers: Commission further cuts red tape for merging businesses. 2023.
[27] Ibid.
[28] Ibid.
[29] Ibid.

questions and tables as well as streamlines questions on the jurisdictional and substantive assessment of the cases.[30] Third, streamline the review of non-simplified cases. Fourth, optimise the transmission of documents to the Commission.[31]

2.1.1. Theories of harm for digital mergers

The following will provide a short outline on the theories of harm for digital mergers as well as some background. Firstly, it is relevant to recognize the characteristics of digital markets.[32] Digital markets can be considered as fast changing and innovation driven.[33] Since many of the digital products and services offered are free of charge, a new consideration is required of non-price parameter of competition in merger control in addition to potentially a broader use of quality-focused theories of harm.[34] Moreover, in the digital markets the most damaging impact of a merger can be for instance, rather related to the innovation than money.[35]

The most common theories of harm that have been used in digital mergers are introduced next.[36] These theories could be considered as more traditional.[37] First, horizontal theories of harm, which involve mergers between direct competitors.[38] Horizontal mergers remove a competitive constraint from the market which can be an existing or a potential future competitor. These mergers eliminate direct competition from a competitor offering an alternative product or service.[39] Furthermore, non-horizontal mergers have been presumed pro-competitive traditionally.[40] Non- horizontal theories of

[30] Ibid.
[31] Ibid.
[32] OECD. Theories of harm for digital mergers – Background note. By the Secretariat. 2023.
[33] Ibid. 9 P. 7.
[34] Ibid. 23 P. 9.
[35] Ibid. 25 P. 9.
[36] Ibid. 30 P. 11.
[37] Ibid. 31 P. 11.
[38] Ibid 32. P 11.
[39] Ibid.
[40] Ibid. 55 P. 17.

harm are at the core of the assessment of most digital mergers.[41] Vertical effects arise when the companies are active at different levels of the supply chain when conglomerate effects arise when the products of the parties are not in the same product market.[42] Furthermore, with the challenges of the mergers in the technology sectors, the competition authorities need to use more speculative theories as well as incorporate additional elements of uncertainty into existing theories inter alia to assess mergers in the innovative markets.[43]

Additionally, the Commission has adopted an innovation theory of harm in its decision on the Dow-DuPoint case.[44] Here, the Commission has shifted the focus of its dynamic merger analysis to "innovative markets" or "innovative spaces".[45] The Commission stated that mergers generally stifle innovation and that even mergers with static effects are considered as benign could be seen as anticompetitive in a dynamic perspective.[46]

2.2. Killer Acquisitions in the technology sector and innovation

The concept of so called "killer acquisitions" has been under discussion in the recent years. Quote by Mark Zuckemberg "It is better to buy than compete" summarizes the idea behind the concept.[47] In the limelight here are unsurprisingly the big technology companies. The House Judiciary Committee's report, *Investigation of Competition in the Digital Markets*, has

[41] Ibid 53 P. 17.
[42] Ibid. 54 P. 17.
[43] Ibid. 122 P. 35.
[44] Denicolò, V, Polo, M. 2018. The Innovation Theory of Harm: An Appraisal. Working Paper N. 103. P. 1.
[45] Ibid. P. 2.
[46] Ibid.
[47] Roberts, M. (2022). Killer acquisitions and the death of competition in the digital economy. Transactions: The Tennessee Journal of Business Law, 24(1), P. 61.

stated that Google, Apple, Facebook, and Amazon have conducted in more than 300 global acquisitions between the years 2009 and 2019.[48] The effectiveness of legislation concerning the catching of killer acquisitions has been under debate as well. In summary, killer acquisitions happen when dominant companies buy off the competition and further on end up killing the innovation which results in distorting the free competition that would have existed if the acquired company was competing with the acquiring company.[49] Therefore, the acquiring companies neutralize competitive threats and strengthens their own position in the market.[50] This results in harming the consumers as well as the entrepreneurs in addition to making entry into the market almost impossible.[51] Killer acquisitions in the technology sector results in the increased power of few leading companies. The objective of the merger control system in the EU is to prevent mergers to distort competition or hinder the functioning of the internal market.[52] The first step to take when examining a transaction is to assess whether the transaction is a concentration under competition law as well as whether the concentration is subject to a mandatory merger control filing.[53] From the narrative of competition law, the concept of concentration includes transactions constituting a lasting change in the control structure of the company at hand as well as, as a consequence of the merger, possibly, in the structure of the relevant market.[54]

Furthermore, killer acquisitions are something that will be discussed throughout the paper when moving on to investigating the competition issues arisen from the acquisitions made by the leading technology companies and tech mergers in the context of innovation. The main concern when discussing the increasing number of tech acquisitions is the harm to innovation. When an incumbent firm acquires a nascent firm and kills the innovation by for

[48] Ibid.
[49] Ibid. P. 65.
[50] Ibid. P. 64.
[51] Ibid.
[52] Faria, T, Martins, M, Nnunes, M. New Trends in Merger Control: Capturing the so-called Killer Acquisitions… and everything else. (2023) Actualidad Jurídica Uría Menéndez. P. 34.
[53] Ibid.
[54] Ibid.

instance, discontinuing the product of the nascent firm.[55] For the large and powerful companies, it is easier to buy the company and kill the innovation strengthen their own position in the market rather than compete with them organically as if the nascent firm would not be acquired. However, from the narrative of competition law as well as the Commission, this is not what keeps the competition effective in the markets. When new innovative technology is introduced, it can present a threat to the existing companies in the field as well as sometimes to an entire industry.[56] It is important that the innovation is uplifted and that there is appropriate competition which is in accordance with the EU competition law. Killer acquisitions are a rising concept in the technology and pharmaceutical sectors. Whether these are appropriately caught by the Commission and investigated is another question itself. The numbers speak for themselves, looking at the amount of acquired companies by the largest technology companies in the world, it is inevitable that these acquisitions have had some form of an impact to the competition and the whole technology industry. These large players are enjoying the amount of power in the digital sector that the new start-up firms can only dream of. The evaluation of effective merger control is relevant when considering killer acquisitions in the digital markets.

2.3. EU Merger Control and the new guidelines for Article 22 EUMR

During the past years there has been an increase of merger filings.[57] The effects of the big tech acquisitions to the markets are yet unknown. The fact that Amazon, Apple, Facebook, Google, and Microsoft have acquired over

[55] Competition Policy International. 2020. Remember Stacker? Another look at "killer acquisitions in the digital economy. P. 3.
[56] Bhussar, M. S., Sexton, J. C., Zorn, M. L., & Song, Y. (2022). High-tech acquisitions: How acquisition pace, venture maturity, and founder retention influence firm innovation. Journal of Business Research, 142. P. 620.
[57] Hutchinson, C, Treščáková, D, Berdnikova, A, Samorodeskii, D, Lobanov, D, Semtsiva, S. 2023. Big tech's acquisition challenge to EU merger control. European Competition Journal.

400 companies globally, has an inevitable impact on the competition and the technology sector.[58] There have been concerns by the impact of those acquisitions in the digital markets. The regulators are at unease around the fact that a large tech company acquires a small usually a start-up company that generates little or no turnover.[59] When the removal of potential and actual competitors is in question, it indicates that competition concerns are at hand.

Article 22 EUMR sets out the referral procedure, where a request can be made for the Commission to review a transaction.[60] The EU merger control framework has been mainly based on the turnover of the companies involved in the concentration.[61] In circumstances, where there is no sufficient turnover yet generated to meet the turnover thresholds which are set in the Articles 1(2) and 1(3) of the European Union Merger Regulation (EUMR), the transaction may not be caught by the Commission's jurisdiction.[62] However, in 2021 the Commission has published its communication concerning the referral mechanism set out in Article 22 of the EUMR to certain categories of cases.[63] The following sets out the content of Article 22 EUMR: *"Article 22 of the EUMR allows one or more Member States to request the Commission to examine, for those Member States, any concentration that does not have an EU dimension but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request."*[64] The mechanism of Article 22 EUMR has allowed the Commission to review a large number of transactions especially

[58] Ibid.
[59] Ibid. P. 2.
[60] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (Text with EEA relevance)
[61] Hutchinson, C, Treščáková, D, Berdnikova, A, Samorodeskii, D, Lobanov, D, Semtsiva, S. 2023. Big tech's acquisition challenge to EU merger control. European Competition Journal.
P. 3.
[62] Ibid.
[63] Communication from the Commission. Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases. 2021.
[64] Ibid. 1.6.

in the industrial, manufacturing, pharmaceutical and digital sectors.[65] The Commission Guidance states that in the recent years, the result of market developments has been an increase of concentrations involving firms that play or may develop into playing a significant competitive role on the market or markets concerned with little or no turnover at the moment of the concentration.[66] Therefore, the EU has taken a new approach to Article 22 EUMR. The reasons behind the new guidelines are concerning the current increase in the number of concentrations that has been detected involving emerging as well as innovative undertakings with competitive potential but generates little or no turnover.[67]

The new guidelines have been applied in one pharmaceutical transaction, Illumina/GRAIL.[68] This transaction can be considered as a precedent from the Commission and its decided approach towards the new guidelines and the possibilities that they offer. The questions that have arisen around the new guidelines by the Commission concerns mainly whether this new policy is compatible with general principles of EU law such as legal certainty and legitimate expectations.[69] The Illumina/GRAIL transaction is significant when considering the Commission's new guidelines. The transaction between the two companies will be discussed shortly in this paper to provide context to the referral procedure and Commission's approach to secure competition in the EU. Article 22(1) EUMR, referral to the Commission, provides the following: "*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. Such a request shall be made at most within 15 working days of the date on which*

[65] Ibid.
[66] Ibid. 1.9.
[67] Looijestijn-Clearie, A., Rusu, C. S., & Veenbrink, M. J. M. (2022). In search of the Holy Grail? The EU Commission's new approach to Article 22 of the EU Merger Regulation. Maastricht Journal of European and Comparative Law, 29(5). P. 550.
[68] Ibid. P. 552.
[69] Ibid.

the concentration was notified, or if no notification is required, otherwise made known to the Member State concerned."[70]

Therefore, the first condition is that the concentration must have an effect to the trade or threaten significantly to have an effect to the trade between Member States. The Commission must analyze whether there could be potential effects to the trade as well and take those into account in circumstances where they are "sufficiently appreciable and foreseeable".[71] The sectors in which there have been seen a significant number of acquisitions, some which could be considered as killer acquisitions, are mainly pharmaceutical and technology sectors. The focus of this paper is generally the technology sector, but in some circumstances such as the Illumina/GRAIL transaction, it is relevant to discuss pharmaceutical sector as well.

Furthermore, the paper will discuss shortly the Illumina/GRAIL transaction. The acquisition of GRAIL by Illumina is the first transaction that has been prohibited by the Commission in accordance with the new guidelines for Article 22 EUMR.[72] The Commission stated that the merger would have had an adverse effect on innovation as well as reduced choice in the emerging market for blood-based early cancer detection tests.[73] This decision follows an in-depth investigation conducted by the Commission concerning the merger. During this investigation the Commission has received feedback from customers as well as competitors and experts in the relevant field.[74] The Commission found during its investigation that Illumina would have had the ability as well as the incentive to engage in foreclosure strategies against

[70] Eur-Lex. Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings. Article 22(1).
[71] Looijestijn-Clearie, A., Rusu, C. S., & Veenbrink, M. J. M. (2022). In search of the Holy Grail? The EU Commission's new approach to Article 22 of the EU Merger Regulation. Maastricht Journal of European and Comparative Law, 29(5). P. 554.

[72] European Commission. Mergers: Commission prohibits acquisition of GRAIL by Illumina. 2022.

[73] Ibid.
[74] Ibid.

GRAIL's rivals.[75] Furthermore, Illumina proposed remedies addressing the Commission's concerns about the transaction between the companies. However, the Commission found that the remedies proposed by Illumina were not sufficient to address the competition concerns which resulted in the conclusion that the remedies were not sufficient to prevent the harm of innovation in the relevant field.[76] Furthermore, the Commission prohibited the transaction.[77] This prohibition is relevant since it is the first of its kind and provides an overview of the Commission's approach and strategy towards the new guidelines for the referral system. The new guidelines and the increasing number of referrals to the Commission indicates that in the future, in theory, any transaction could end up being investigated by the Commission. There is an ongoing debate concerning the new guidelines and the impact of the increasing referrals to the Commission in the context of legal certainty.[78] This, however, is left outside of the scope of this paper.

The Illumina/GRAIL prohibition, if seen as a precedent, could impact future technology transactions as well. Since pharmaceutical as well as technology sectors are the ones that are under the magnifying glass considering the so-called killer acquisitions in addition to transactions that are raising competition concerns in general in the context of having an adverse impact to the innovation in the specific fields such as technology.[79] Furthermore, it is possible that technology transactions that would have not been investigated by the Commission before, when the only thresholds for notifying a transaction for referral were turnover thresholds, would now be investigated and eventually prohibited by the Commission since there would be an adverse impact to the innovation resulting from the merger.

[75] Ibid.
[76] Ibid.
[77] Ibid.
[78] Turgot, C. (2021). Killer acquisitions in digital markets: evaluating the effectiveness of the eu merger control regime. European Competition and Regulatory Law Review (CoRe), 5(2). P. 118.
[79] Competition Policy International. 2020. Beyond killer acquisitions: are there more common potential competition issues in tech deals and how can these be assessed?

2.3.1. The Digital Markets Act

The DMA provides an objective criterion for qualifying a large online platform as a so-called “gatekeeper”. The DMA aims to ensure that large online platforms behave online in a fair way.[80] The DMA interacts with the competition enforcement and Articles 101 as well as 102 TFEU will be used in a complementary way.[81] Since the DMA imposes the obligation to inform the Commission about the acquisition, the provision is likely to be applied with Article 22 EUMR.[82] The DMA in addition to the new guidelines for Article 22 EUMR will therefore increase the amount of transaction referrals to the Commission.[83]

[80] European Commission. The Digital Markets Act: ensuring far and open digital markets.
[81] White & Case. The Digital Markets Act (DMA) goes live. 2022.
[82] Ibid.
[83] Ibid.

3. Summaries of the acquisitions

3.1. Google's Acquisitions

Google is considered as one of the Big Five tech companies. Google operates as an Internet search engine and provides advertising space.[84] Google is a public company that is listed on the Nasqad stock exchange, and it has become the most popular internet search engine.[85] Furthermore, Google has started to provide online advertising space on its websites and other partner websites.[86] Most of Google's revenue is derived from online advertising.[87]

3.1.1. Google/DoubleClick

The Commission conducted an in-depth investigation concerning the acquisition of DoubleClick by Google.[88] It was concluded that it is unlikely that the transaction will result to harmful effects on consumers.[89] Furthermore, it is concluded that the transaction would not significantly impede effective competition within the European Economic Area (EEA) or a significant part of it.[90]

[84] European Commission. Mergers: Commission clears proposed acquisition of DoubleClick by Google. 2008.
[85] Case No COMP/M.4731 – Google/ DoubleClick. 2008. 4. P. 5.
[86] Ibid.
[87] Ibid.
[88] European Commission. Mergers: Commission clears proposed acquisition of DoubleClick by Google. 2008.
[89] Ibid.
[90] Ibid.

DoubleClick is a company selling mainly ad services, management, and reporting technology worldwide.[91] Google conducted an in-depth market investigation concluding that there were no major competitive constraints and that the parties could not be considered as competitors.[92] The Additionally, the Commission concluded that there would not be an adverse impact on competition in the online advertising services market.[93] Furthermore, the Commission cleared the proposed merger based on its appraisal under the EU Merger Regulation.[94]

3.1.2. Google/Fitbit

The Commission has conducted an in-depth investigation concerning the acquisition of the transaction between Google and Fitbit.[95] The Commission had competition concerns in several markets such as advertising, access to Web Application Programming Interface (API) in the market for digital healthcare and wrist-worn wearable devices.[96] Other concerns raised were around privacy. The investigation conducted by the Commission found that Google will have ensure compliance with GDPR. However, these concerns are not concerned with merger control.[97]

However, the approval of the acquisition is conditional. The following commitments were offered by Google. Google will not be using the health and wellness data collected from wrist-worn wearable devices and other Fitbit devices of users in the EAA for Google Ads, Google will have a technical separation of the Fitbit's relevant user data and Google will ensure that EEA users will have a choice to deny the use of their health and wellness data.[98]

[91] Ibid.
[92] Ibid.
[93] Ibid.
[94] Ibid.
[95] European Commission. Mergers: Commission clears acquisition of Fitbit by Google, subject to conditions. 2020.
[96] Ibid.
[97] Ibid.
[98] Ibid.

Additionally, there are commitments concerning WEB API Access as well as Android APIs.[99]

3.1.3. Google/Motorola Mobility

The Commission has approved the acquisition of Motorola Mobility by Google since it will not significantly alter the market situation concerning operating systems as well as patents.[100] Additionally, the Commission has investigated whether Google would be able to use Motorola's patents to acquire preferential treatment for its services such as search and advertising.[101] Furthermore, the Commission came to the conclusion that the transaction would not significantly hinder effective competition in the EEA.[102]

3.2. Microsoft's acquisitions

Microsoft is a global technology company which develops, licenses as well as supports software products, services, and devices.[103] Microsoft offers products such as operating systems for personal computers, servers, and mobile devices, cross-device productivity applications, video games, in addition to cloud-based solutions and online advertising.[104]

[99] Ibid.
[100] European Commission. Mergers: Commission approves acquisition of Motorola Mobility by Google. 2012.
[101] Ibid.
[102] Ibid.
[103] European Commission. Mergers: Commission approves acquisition of LinkedIn by Microsoft, subject to conditions. 2016.
[104] Ibid.

3.2.1. Microsoft/LinkedIn

The Commission has investigated the Microsoft/LinkedIn transaction. The Commission had concerns around the increase in LinkedIn's user base in the context of new players trying to start providing professional social network services in the EEA.[105] Additionally, the Commission had concerns regarding LinkedIn's visibility, that it would be significantly increased whilst competing professional social networks could potentially be denied such access. This could potentially result in LinkedIn being able to expand its user base as well as activity to a certain extent that it would not have been able to do without the merger.[106]

Furthermore, the Commission has concluded that the transaction between Microsoft and LinkedIn will not raise competition concerns. This is a result of commitments offered by Microsoft which will apply in the EAA for a period of five years as well as will be monitored by a trustee.[107] Therefore, the Commission has cleared the transaction conditionally upon full compliance with the commitments.[108]

3.2.2. Microsoft/Skype

The Commission has cleared the transaction between Microsoft and Skype under the EU Merger Regulation. The Commission concluded that the transaction will not significantly hinder effective competition in the EAA.[109] The Commission concerns revolved around the area of consumer communications as well as enterprise communication. Additionally, the investigation conducted by the Commission focused on possible

[105] Ibid.
[106] Ibid.
[107] Ibid.
[108] Ibid.
[109] European Commission. Mergers: Commission approves the acquisition of Skype by Microsoft. 2011.

conglomerate effects, since both companies are active in neighboring markets.[110]

3.2.3. Microsoft/GitHub

The Commission has approved the acquisition of GitHub by Microsoft.[111] GitHub as well as Microsoft supply tools for developing and releasing software for individuals and organizations.[112] Both companies provide access to platforms for software development, code editors, and integrated development environments.[113] The Commission came to the conclusion that the activities of the companies' combined would not raise competition concerns since the merged entity would continue to face significant competition from other players on both markets.[114] Furthermore, following the investigation, the Commission has concluded that the transaction between Microsoft and GitHub would not raise competition concerns in any of the markets affected.[115] The transaction was cleared unconditionally.[116]

3.2. Amazon's acquisitions

Amazon is a technology company operating a range of businesses such as retail, consumer electronics, and technology services.[117]

3.3.1. Amazon/MGM

The Commission has approved the proposed transaction of MGM Holdings Inc. by Amazon. MGM is a company based in the US, active in the production

[110] Ibid.
[111] European Commission. Mergers: Commission approves acquisition of GitHub by Microsoft. 2018.
[112] Ibid.
[113] Ibid.
[114] Ibid.
[115] Ibid.
[116] Ibid.
[117] European Commission. Mergers: Commission approves acquisition of MGM by Amazon. 2022.

and distribution of AV content in the EEA as well as globally.[118] Additionally, MGM provides a wholesale channel called MGM+ through retail distributors such as Prime Video, Zattoo, and Mediaset.[119]

The Commission has conducted a market investigation concerning the proposed transaction and during the investigation it has examined the following aspects: the horizontal overlaps between the activities of the two companies in the AV content value chain, vertical links between the activities of the two companies in the AV content value chain, the vertical link between the activities of the two companies in the upstream market for production and licensing of films for theatrical release and the downstream market for the theatrical exhibition of films as well as the conglomerate links in the context of MGM's content and Amazon's bundle of AV retail and marketplace service products.[120] Furthermore, the Commission concluded that the transaction would not raise competition concerns in the EEA.[121]

3.4. Meta's acquisitions

Meta, formerly known as Facebook, is a multinational company providing various websites and applications for mobile devices offering services such as consumer communications, social networking as well as video-sharing.[122] Meta makes its revenue primarily by offering ads space as well as related services to third parties.[123]

3.4.1. Meta/Kustomer

Kustomer is a company based in the US that offers a CRM Software as a Service tool specializing in customer service. The acquisition of Kustomer by

[118] Ibid.
[119] Ibid.
[120] Ibid.
[121] Ibid.
[122] European Commission. Mergers: Commission clears acquisition of Kustomer by Meta (formerly Facebook), subject to conditions. 2022.
[123] Ibid.

Meta has been approved by the Commission under EU Merger Regulation.[124] However, the acquisition is conditional on full compliance with commitments offered by Meta.[125] The Commission conducted an in-depth investigation where extensive information was gathered as well as feedback from customers as well as competitors. Additionally, the Commission worked closely with competition authorities of the Member States and around the world.[126]

The following will present the proposed remedies offered by Meta to address the competition concerns presented by the Commission. Meta offered a public API access commitment as well as a core API access-parity commitment for the duration of ten years.[127] Furthermore, the implementation of the commitments will be monitored by a trustee that has been appointed before the closure of the transaction.[128] As a conclusion, the Commission has cleared the proposed transaction between Meta and Kustomer conditionally, requiring the full compliance with the commitments offered by Meta.[129]

3.4.2. Facebook/WhatsApp

Facebook (currently Meta) notified the acquisition of WhatsApp in 2014. The Commission has cleared the proposed transaction between Facebook and WhatsApp.[130] In its investigation, the Commission concluded that Facebook and WhatsApp are not considered as close competitors and that consumers would continue to have a choice of alternative consumer communications apps after the merger as well.[131] The investigation of the Commission had its focus on three separate areas which are the following: first, consumer

[124] Ibid.
[125] Ibid.
[126] Ibid.
[127] Ibid.
[128] Ibid.
[129] Ibid.
[130] European Commission. Mergers: Commission approves acquisition of WhatsApp by Facebook. 2014.
[131] Ibid.

communications services, second, social networking services, and third, online advertising services.[132] The focus of the investigation regarding consumer communications as on apps for smartphones.[133] Concerning social networking services, some third parties suggested that WhatsApp is already competing with Facebook and is a social network.[134] Here, the Commission concluded that they could be seen as distant competitors in this area and that there are other alternative service providers as well.[135] Lastly, the Commission investigated whether the transaction is able to strengthen the position of Facebook in the online advertising market and harm competition regardless of the fact that WhatsApp is not active in that market.[136] In summary, based on the aspects laid down above, the Commission cleared the transaction between Facebook and WhatsApp.[137]

Furthermore, after the transaction was cleared by the Commission, Facebook was fined €110 million for providing misleading information about the acquisition.[138] The fine was imposed for providing misleading information during the Commission's 2014 investigation under the EUMR.[139] Under the EUMR, the parties of a merger investigation are obliged to provide current information that is not misleading since it is significant for the Commission to appropriately review the merger.[140] Here, Facebook informed the Commission that it is not able to establish a reliable automated matching between its users' accounts and WhatsApp's users' accounts, this was stated in the notification form as well as in the reply to a request of information from the Commission.[141] Furthermore, it became known that contrary to the statements of Facebook, the technical possibility of automatically matching the companies' users' identities existed when the merger investigation took

[132] Ibid.
[133] Ibid.
[134] Ibid.
[135] Ibid.
[136] Ibid.
[137] Ibid.
[138] European Commission. Mergers: Commission fines Facebook €110 million for providing misleading information about WhatsApp takeover. 2017.
[139] Ibid.
[140] Ibid.
[141] Ibid.

place.[142] Additionally, it became known that Facebook staff knew about this possibility.[143] However, this did not impact the final result of the investigation to clear the transaction since it was based on elements which went beyond automated user matching.[144]

3.5. Apple's acquisitions

Apple is a global technology company based in the US. Apple designs, manufacturers as well as sells media devices, portable digital music players and personal computers.[145] Additionally, the company sells and delivers digital content online. Furthermore, Apple offers the music and video streaming service called Apple Music.[146]

3.5.1. Apple/Shazam

Shazam is based in the UK and the company develops as well as distributes music recognition applications for smartphones, tablets, and PCs.[147] The Commission has cleared the proposed acquisition of Shazam by Apple under the EU Merger Regulation.[148] It was concluded by the Commission that the merger between the two companies would not affect competition in the EAA or any substantial part of it in an adverse way.[149]

Apple and Shazam provide complementary services and there is no competition between the two companies.[150] Furthermore, the Commission conducted an in-depth investigation to assess the following. Firstly, whether

[142] Ibid.
[143] Ibid.
[144] Ibid.
[145] European Commission. Mergers: Commission clears Apple's acquisition of Shazam. 2018.
[146] Ibid.
[147] Ibid.
[148] Ibid.
[149] Ibid.
[150] Ibid.

Apple would gain access to sensitive data concerning customers of its competitors in addition to whether this data allows Apple to directly targets the customers of its competitors and stimulate them to switch to Apple Music.[151] Secondly, whether Apple Music's competitors would be at disadvantage if Apple were to discontinue referrals from the Shazam app to them after the transaction.[152]

[151] Ibid.
[152] Ibid.

4. Analysis of the Commission's competitive assessments of the acquisitions

The following will present an analysis of the Commission's approach concerning the acquisitions laid down shortly earlier in this paper. This chapter aims to answer the first part of the research questions of what can be learned from the Commission's decisions concerning the transactions. Furthermore, the next chapter will answer the second part of the research question and connect the conclusions made in this chapter. The analysis aims to identify similar issues around the acquisitions as well as recognize the Commission's approach towards big tech mergers. This section will be divided in the recognized issues investigated in the Commission's decisions concerning the transactions. The main objective of this chapter is to analyze the aspects that the Commission has investigated when assessing tech mergers in the past. The issues considered in the Commission's decisions are the following: dominance in the market, data collection as well as concerns around access to data, potential impact on competitors and innovation concerns. Following the sub-chapters, a summary and discussion will be provided concerning the assessments.

4.1. Dominance in the market

The Commission's investigations show that in each of these mergers, the gaining or strengthening the dominant position in the relevant market post-merger is considered. The Commission's Google/DoubleClick investigation concerns the parties' positions in the relevant markets are considered first.

Here, both Google and DoubleClick are active in the "online advertising" industry, this industry consists of web publishers selling advertising space to generate revenue as well as advertisers, who buy such space to place their ads on the internet.[153] Google is the leading provider of online advertising, particularly of search space in the EEA.[154] Google's main competitors in the search advertising market are Yahoo! and Microsoft.[155] DoubleClick as well can be considered as a market leader on the advertiser side.[156] The Commission's investigation indicates that Google and DoubleClick are not considered as direct competitors since DoubleClick does not sell advertising space whereas Google is present in the market for the provision of online advertising space.[157] Here, the relevant market is the online advertising services market which encompasses different forms of advertising. Furthermore, the Commission assessed the competitive dynamics within this market. Here, the focus is on the Commission's assessment based on Google's market position in search advertising services as well as intermediation services and foreclosure strategies.[158] The possible attempt of bundling of Google's sales of search ads or its intermediation services for sale of search or non-search ads with DoubleClick ad serving technology has raised concerns.[159] The focus of the concern here is the merger may conver Google the ability and incentive to leverage its strong market position resulting for the reducing ability and incentive for actual and potential rivals in the ad serving market to compete which would result to imposing even wider bundle on advertisers as well as publishers including Google's non-search intermediation services.[160] This would lead to foreclosing its actual and potential competitors in non-search intermediation.[161] The Commission addressed this by stating that Google may have the ability to foreclose its

[153] Case No COMP/M.4731 – Google/ DoubleClick. 8. P. 6.
[154] Ibid. 95. P. 27.
[155] Ibid. 110. P. 34.
[156] Ibid. 114. P. 35.
[157] Ibid. 192. P. 52.
[158] Ibid. 7.3.2. P. 86
[159] Ibid. 330. P. 86.
[160] Ibid. 331. P. 87.
[161] Ibid.

rivals by bunding s but would not most likely to have the incentive to do so.[162] In summary, the Google/DoubleClick merger raised dominance questions in the online advertising market post-merger. The concerns around Google's potential leveraging of the dominant position in the search advertising market. This is focusing further on to the user information gained post-merger and this will be discussed more in-depth under the section concerning data collection concerns.

Furthermore, the investigation conducted by the Commission concerning the transaction Google/Fitbit, recognizes the market position of Google as well. The Commission considers that Google is dominant in the supply of online search advertising services in the EEA countries, holds a strong market position in the supply of online display advertising services in several countries as well as holds a strong market position in the supply of ad tech services in the EEA.[163] Here, the focus of the investigation was concerning wearable devices industry. Wearable devices are worn on the body, and they can record health and body measurements.[164] Here, the largest segment are devices worn on the wrist such as fitness trackers as well as smartwatches.[165] Furthermore, the Commission has not previously investigated the market for wrist-worn wearable devices. The Commission addresses that wrist-worn wearables constitute a separate market from other types of wearables, this was accompanied by the Notifying Party.[166] Here, the concerns around the market position of Google focused on the data collected post-merger leading to a stronger position in the digital advertising market. This will be discussed further on under the data collection concerns as well.

The Commission's competitive assessment of the transaction Microsoft/GitHub, the creation or strengthening of a dominant position is

[162] Ibid. 332. P. 87.
[163] European Commission. Mergers: Commission clears acquisition of Fitbit by Google, subject to conditions. 2020.
[164] Case M.8994 – Microsoft/GitHub. 2018 (27) P. 14.
[165] Ibid. (28) P. 15.
[166] Ibid. (74) P. 23.

investigated.[167] The Commission has stated that under the substantive test set out in Article 2(2) and (3) EUMR, also mergers that do not lead to the creation or the strengthening of the dominant position of a company might be incompatible with the internal market as well.[168] The Notifying Party's view here is that the transaction is mainly reputational leverage to improve the perception of Microsoft's products from the narrative of the developers since the main driver for the transaction is the reputation of GitHub by the open source community of "Modern Developers".[169] Through the transaction, Microsoft aims to demonstrate a commitments towards this community and hopes that this will make a change to its reputation and welcome more traffic to Microsoft's cloud offerings as well as its DevOps tools as options even for open source software projects.[170] The Commission's states the following: "*the transaction does not raise serious doubts as to its combability with the internal market as regards the potential market for source code hosting services for version control and collaboration as a result of horizontal non-coordinated effects."*[171] Therefore, the acquisition was generally well received and Microsoft aims at demonstrating a commitment to maintaining GitHub as an independent platform.[172]

4.1.1. Discussion

Concerns relating to the strengthening of the market position post-merger are investigated in all the transactions discussed. First, it is important to define the relevant market which differs between the transactions. In the circumstances of the transaction between Google and DoubleClick, the investigation was focused to the online advertising industry for example. Some of the Commission's decisions concerning the transactions were focused on multiple different markets. However, in most of the cases here,

[167] Ibid. (65) P. 10.
[168] Ibid. (71) P. 11.
[169] Ibid. (89) P. 15.
[170] Ibid.
[171] Ibid. (93) P. 15.
[172] Ibid. (89) P. 15.

this paper only focuses to a certain part of the investigation where the concerns relevant for this research were discussed. Furthermore, when recognizing the relevant market for each transaction, the Commission moves forward to identify the companies' current position at those markets. Furthermore, the Commission assesses the parties' positions in the market pre-merger and considers the concerns the transaction may pose post-merger. Moreover, the anticompetitive effects are identified by the Commission and evaluated depending on the case and the circumstances considering different factors. Some of these factors are discussed more in-depth further on in this paper, such as the data collection capabilities, impact on competitors as well as innovation concerns. In a way different factors come together, and some are discussed partly under different chapters since they are interconnected. This chapter of market dominance is one of the main ones since the different concerns discussed further on, such as data collection may result to the strengthening of the position in the market.

Since the FAAMG companies are big players in the digital markets, they already have acquired a strong market position. Therefore, it is important to investigate the effects post-merger, whether the acquisition will lead to even stronger market position which will result in the impediment of the effective competition. All the transaction discussed above were cleared by the Commission. The following chapters will dig deeper the Commission's investigations concerning certain aspects of the transactions leading to the approval of the mergers.

4.2. Data collection

Several mergers presented above have raised concerns around data collection possibly leading to adverse effects to the competition post-merger. The Commission has investigated the potential of data collection in several of the transactions investigated in this paper. The investigation of the transaction

Google/Fitbit concerns collected data via wrist worn wearable devices.[173] The question of increased data advantage of Google is raised by the Commission, and it is considered as an important factor in the online advertising markets. The Commission's concerns considered specifically the increasing of the data advantage in the personalization of the ads it serves via its search engine as well as displays on other internet pages which would result in difficulties for rivals to match Google's online advertising services.[174] The investigation about data collection concerned primarily Fitbit's health and fitness data with Google's data collection capabilities.[175] The Commission has concluded in its decision concerning the Google/Fitbit transaction the following: *"In conclusion the Commission considers that the Transaction will not likely lead to any significant impediment of effective competition as a consequence of the likely horizontal effects arising from the combination of Google's and Fitbit's user databases and data collection capabilities for use in the field of digital healthcare."*[176] The transaction was clear subject to conditions. Google offered to follow a list of commitments concerning the use of data which implementation will be monitored for a duration of ten years which was extended by up to an additional ten years.[177]

The Commission's investigation of the Google/DoubleClick merger concerned data collection as well. Here, a part of the investigation concerned data collection in the context of online advertisement targeting.[178] The Commission investigated data gathered by other online operations as well and concluded that the merged entity would not have access to unique and non-replicable data since the information gathered by DoubleClick is narrow in scope.[179] The Commission added that the merger would not make a significant change to the current situation as well as would not acquire

[173] European Commission. Mergers: Commission clears acquisition of Fitbit by Google, subject to conditions. 2020.
[174] Ibid.
[175] Ibid.
[176] Case M.9660 – Google/Fitbit. 2020. (496) P. 113.
[177] European Commission. Mergers: Commission clears acquisition of Fitbit by Google, subject to conditions. 2020.
[178] Case No COMP/M.4731 – Google/ DoubleClick. 269. P. 70.
[179] Ibid.

additional means to put pressure on its customers to agree to less compelling contract provisions.[180] Furthermore, the Commission concluded that the bundling of Google's search ad offering with the ad serving technology of DoubleClick seems unlikely in the light of the proposed merger.[181] In circumstances where it would occur, it would not result in a significant impediment to effective competition.[182] The combination of the databases of Google and DoubleClick raised questions of privacy as well. The enhanced possibilities to track customer online behavior as well as use it for targeting purposes. However, the focus of the Commission's assessment concerning the collected data was on the combination of the parties' data bases and whether the merger would result significantly impeding effective competition[183]

The Commission has investigated the data collection capabilities of Meta (formerly Facebook) in its investigation of the transaction Meta/Kustomer.[184] Meta relies on data access as well as the collection of data to improve their ads services.[185] The data that Meta collects could give an advantage on the market for online display advertising services in the following ways: the data could be used to improve ad targeting and to measure "conversions".[186] Additionally, Meta uses data shared by advertisers for system improvement.[187] The Commission has concluded in its investigation that Meta holds a significant market power in the market for online display advertising services and has pre-merger data collection capabilities that provide a significant advantage.[188] Furthermore, the Commission moves forward to investigate the data accumulation by Meta resulting from the

[180] Ibid. 274. P. 71.
[181] Ibid.
[182] Ibid.
[183] Google/DoubleClick: The first test for the Commission's non-horizontal merger guidelines. Brockhoff, J, Jehanno, B, Pozzato V, Buhr, C, Eberl, P and Papandropoulous, P. 2008. Competition Policy Newsletter. No 2. P. 59-60.
[184] Case M. 10262-Meta (formerly Facebook) / Kustomer. 2022.
[185] Ibid. (550) P. 151.
[186] Ibid. (551) P. 151.
[187] Ibid.
[188] Ibid. (559) P. 154.

acquisition of Kustomer.[189] The Commission stated that although Kustomer itself does not own or control the data of its business customers and that Meta might already receive similar data, the transaction could lead to further data accumulation by Meta.[190] It is argued that the accumulation of data will not have a substantial impact on competition in the market for online display advertising services or any segment of it.[191] Furthermore, it is stated that resulting from the tiny scale of Kustomer, the transaction will not provide competitive advantage to meta sufficient enough to substantially impact competition.[192] It is noted, that directly, the acquisition does not lead to an increased market share of Meta on the market of online display advertising services.[193] Kustomer is not active on this market.[194] Finally, on the basis of the Commission's assessments it is concluded that Meta may be able to gain additional data that could be used to improve Meta's online display advertising services by granting it a further data advantage on the market for online display advertising services or any of its segment.[195] Furthermore, competitor providers of online display advertising services will continue to have access to similar commercial data as a result of the commercial interest of business in sharing such data with both Meta as well as rival advertising platforms.[196] Therefore, the Commission has concluded in its decision that any data that Meta may gain access for the purposes of improving its online advertising service would not result in a significant negative impact on competition between providers of online display advertising services.[197]

Moreover, the investigation concerning the Apple/Shazam merger, concerned Apple's use of Shazam's data. Here, the Notifying Party has stated that the

[189] Ibid. (560) P. 154.
[190] Case M. 10262-Meta (formerly Facebook) / Kustomer. 2022. (573) P. 156.
[191] Ibid. (574) P. 157.
[192] Ibid.
[193] Ibid.
[194] Ibid.
[195] Ibid. (571) P. 156.
[196] European Commission. Mergers: Commission clears acquisition of Kustomer by Meta (formerly Facebook), subject to conditions. 2022.
[197] Ibid.

concentration will not provide access to commercially sensitive information for Apple Music about its competitors and would not lead to anticompetitive foreclosure of its rivals' customers.[198] Furthermore, a claim that an increase in the ability of Apple Music to target rivals' customers using the collected data via Shazam would not be material is raised.[199] The Commission's assessment includes whether the information to which there would have been access by Apple as a result of the merger is commercially sensitive information.[200] Furthermore, the competitive disadvantage resulting from Apple potentially making use of that information is assessed.[201] Furthermore, the ability as well as incentives to use the customer information to put competitors at a competitive disadvantage is discussed.[202] Commenting these concerns the Commission has stated that even if the merged entity were to have the ability and incentives to create competitive disadvantage for providers of digital music streaming apps by using customer information, are unlikely to have an adverse impact on effective competition in the market for digital music streaming apps.[203]

Data collection and access to data concerns are relevant in the competitive assessment of the transaction Microsoft/GitHub as well.[204] GitHub collects user-generated content, metadata in addition to user's personal information.[205] The Commission assessed a potential concern raised to the market investigation where there could be a situation where Microsoft could refuse of degrade access to GitHub's data to its downstream DevOps tools and/or IaaS/PaaS competitors.[206] The Notifying Party as well as the Commission's in its assessment states that Microsoft will have neither the

[198] Case M.8788 – Apple/Shazam. 2018. (201) P. 41-42.
[199] Ibid. (203) P. 42.
[200] Ibid. (209) P. 42.
[201] Ibid.
[202] Ibid. (ii)(iii) P. 45, 48.
[203] Ibid. (246) P. 49.
[204] Case M.8994 – Microsoft/GitHub. 2018.
[205] Ibid. (131). P. 21.
[206] Ibid. (133) P. 22.

ability nor incentive to refuse or degrade access to GitHub's data in a way that would foreclose competition in those potential markets.[207]

4.2.1. Discussion

Data collection capabilities are significant to assess when concerning the merging of two technology companies. Therefore, it does not come as a surprise that there are concerns around that collected data and the possible advantage it might bring post-merger, especially when one of the merging parties have a significant market position. The collected data is vital for technology companies especially for companies that are active in the online advertisement industry. The access of data brings out privacy questions as well as questions around how the data is used in the future after the transaction. Could the collection of data harm effective competition in the internal market and lead to a significant strengthening of market position of the merged entity?

Data collection capabilities are significant in the light of these tech mergers considered since the FAAMG companies have a strong position in the markets. Data-driven mergers have given rise to horizontal effects.[208] The focus has rather been on the exclusionary likelihood on competition than the actual harm caused to consumers resulting from the use of data.[209] Therefore, data collection concerns have been present in multiple cases investigated in this paper. Mainly, the concerns have revolved around whether the access would not be able to be used unfairly to compete or harm competition in the relevant market post-merger. Regardless, of the data collection capabilities, all the mergers investigated were cleared by the Commission. However, some of the mergers required commitments from the parties. Extensive commitments as a solution for difficult merger proceedings are discussed further on in this paper more in-depth.

[207] Ibid. (134) (139) P. 22.
[208] Chirita, A. Theories of harm in "Data-Driven" Mergers. (2018) P. 10.
[209] Ibid.

4.3. Impact on potential and actual competitors

The Commission has investigated the potential and actual impact on competitors of the transactions discussed in this paper. In the decision of the transaction Google/DoubleClick the Commission has investigated the impact of the merger to the competitors. The Commission's investigation lays down the concerns of third parties alleging that the combination of Google's and DoubleClick's assets as well as the combination of customer provided information obtained by the parties, would allow the merged entity to achieve a position that could not be replicated by its competitors which could result in the marginalization of Google's competitors allowing Google to raise the prices for its intermediation services.[210] The Commission has pointed out that the combination of data about searches with data about users web behavior is already available to multiple Google's competitors at the moment. As an example, Microsoft as well as Yahoo! Run search engines as well as offer ad serving.[211] Google and DoubleClick are not considered as direct competitors since the parties do not compete either in the market for the provision of display and serving technology directly.[212] Different foreclosure possibilities are discussed such as the possible foreclosure based on Google's market position which is discussed under market dominance as well as foreclosure based on the combination of Google's and DoubleClick's assets which is discussed under the section data collection concerns. Furthermore, it is concluded that the proposed concentration would not significantly impede effective competition in the common market or in any substantial part of it.[213]

[210] Case No COMP/M.4731 – Google/ DoubleClick. 359. P. 95–96.
[211] Ibid. 365. P. 96–97.
[212] Ibid. 192. P. 52.
[213] Ibid. 367. P. 97.

The Commission has investigated foreclosure possibilities concerning the transaction Microsoft/LinkedIn.[214] Foreclosure occurs where an actual or potential competitor's access to the market is hampered or eliminated post-merger.[215] Here, the Commission has investigated whether the merged entity would have the ability to foreclose access to inputs or customers post-merger and whether it would have the incentive to do so.[216] Additionally, it is investigated whether a foreclosure strategy would have a detrimental impact on competition.[217] Furthermore, the Commission has concluded that the transaction does not raise serious concerns regarding the combability with the internal market as a result of input foreclosure effects.[218]

Facebook (now Meta) as well as WhatsApp both are active in the consumer communications apps market which has been characterized by disruptive innovation.[219] The Commission has concluded in its investigation that there are no significant barriers for a new customer communications app to enter the market.[220] The Commission concluded that the transaction between Meta and WhatsApp does not raise serious compatibility doubts with the internal market with respect to the market for consumer communications app.[221] Furthermore, the impact of the transaction to the social networking services is investigated. The investigation has presented differences between the functionalities and focus of Meta as well as WhatsApp and has concluded that the parties are not close substitutes.[222] The claim concerning potential competition was concluded by the Commission stating that there is no indication of WhatsApp's plans to become a social network which would compete with Facebook if the transaction did not happen.[223] Furthermore, the claim as regards actual competition, the Commission does not take a final

[214] Case M.8124 – Microsoft / LinkedIn. 2016. 182. P. 35.
[215] Ibid.
[216] Ibid. 184. 35.
[217] Ibid.
[218] Ibid. (277) P. 60.
[219] Case No COMP/M.7217 – Facebook/WhatsApp. 2014. (116) P. 21.
[220] Ibid. (116)
[221] Ibid. (142) P. 26.
[222] Ibid. (157–158) P. 28.
[223] Ibid. (145) P. 26.

view on the existence and boundaries of the potential market for constantly evolving social networking services.[224] Therefore, based on the results of the investigation of the Commission, it is concluded that the transaction between the parties would not raise serious compatibility doubts with the internal market as regards the potential market for the provision of social networking services as well.[225]

The Commission has investigated the horizontal effects of the transaction Google/Fitbit. According to the Horizontal Merger Guidelines paragraph 36, a merger can impede significantly effective competition if the merged entity gains a degree of control over an asset that expansion or entry by rival firms may be more difficult.[226] Here, the transaction would allow Google to combine its datasets with Fitbit's datasets which leads to strengthening the parties' ability to supply better services as well as foreclose the competitor's entry and ability to expand in certain data-based supply markets.[227] Set out in the Commission's decision concerning the transaction Apple/Shazam it is stated that there are regulatory limitations with the objective to prevent the illegal combination of datasets.[228] Moreover, Google and Fitbit are accountable to implement the applicable technical as well as organizational measures ensuring as well as being able to demonstrate that the process is performed in accordance with the e-Privacy Directive and the GDPR.[229] Furthermore, the Commission considers that the combination of Fitbit database as well as data collecting capabilities with Google's do not lead to a risk of impediment to effective competition in the market of supply for digital healthcare services resulting from the fact that the parties are neither actual or potential competitors in the collection or marketing of user health and fitness data.[230] Regarding actual competition, the Commission has stated that neither of the parties' are marketing their user data, but the circulation of data

[224] Ibid. (146) P. 26.
[225] Ibid. (163) P.29.
[226] Case M.9669 – Google/Fitbit. 2020. (401) P. 91.
[227] Ibid. (402) P. 91.
[228] Ibid. (403) P. 91.
[229] Ibid. (410) P. 93.
[230] Ibid. (484) P. 112.

is a consequence of the user's decision to actively share them with third parties.[231] Furthermore, the Commission concluded that there is no actual competition between Google and Fitbit. Moreover, regarding potential competition the Commission stated that the status of the market for digital healthcare services as well as its developments, considers that there is not likely an impact to the potential competition for user health data resulting from the transaction.[232] The possible effects of the transaction on potential competition in the supply of smartwatches is investigated by the Commission. The Commission assessed the elimination of Google as a potential competitor as well as the effects of Google's entry after the transaction. [233] The elimination of Google as a potential competitor entering the market if the merger would not happen, is addressed as following: it is considered as unlikely for Google to be able to exert a significant competitive constraint and that the first condition of the Horizontal Merger Guidelines is not met.[234] The first condition is that the potential competitor must exert a significant constraining influence or it is to be likely that it would grow into an effective competitive force.[235] Moving forward to the second scenario concerning circumstances where Google decided to enter the market for smartwatches after the transaction.[236] However, the Commission considers that it is unlikely that there are any competition concerns in this regard based on the information that was available at the moment of the investigation.[237]

The transaction between Amazon and MGM was investigated by the Commission as well. Here, one of the aspects the Commission examined was whether the merged entity would have the ability or the incentive to leverage its position in the market to foreclose rival SVOD platforms by making MGM's content exclusive to a specific provider or by worsening the terms and conditions the company licenses MGM's content to rival platforms

[231] Ibid. (485) P. 112.
[232] Ibid. (486) P. 112.
[233] Ibid. (392) P. 89.
[234] Ibid. (396) P. 90.
[235] Ibid.
[236] Ibid. (397) P. 90.
[237] Ibid.

under.[238] The market investigation conducted by the Commission concluded to a lack of ability as well as incentive from Amazon's side to apply input foreclosure strategies in an effective way.[239] The ability to engage in input foreclosure was assessed and two conditions would have to be met in order for input foreclosure concerns give rise to competition problems.[240] The merged entity would need a significant degree of market power in the upstream market for the concentration to be able to exercise a significant influence on such market as well as on prices as well as supply conditions in the downstream market.[241] The Commission concluded that neither of these conditions are fulfilled here.[242]

Lastly, the discussion moves forward to the transaction between Apple and Shazam.[243] It is stated that to assess whether a significant impediment of effective competition results from the transaction, the Commission must compare whether the conditions that would result from the concentration with the conditions that would have prevailed without the concentration.[244] Usually, the competitive conditions that are existing at the time of the merger constitute the circumstances for the comparison for evaluating the impact of the merger. However, in certain situations, it is possible for the Commission to consider future changes to the market that can be reasonably predicted.[245] This is left to the Commission to show the existence of a significant impediment to effective competition in the market considering reasonably predictable future changes.[246] Here, the Commission investigates licensing of music charts data and online advertising and comes to the conclusion that the concentration would not significantly impede effective competition in respect of neither.[247] Furthermore, the Commission assesses horizontal effects in its

[238] Case M.10349 – Amazon/MGM. 2022. (173) P. 39.
[239] Ibid. (187) P. 41.
[240] Ibid. (188) P. 41.
[241] Ibid.
[242] Ibid.
[243] Case M.8788 – Apple/Shazam. 2018.
[244] Ibid. (174) P. 37.
[245] Ibid.
[246] Ibid.
[247] Ibid. (180) (185) P. 38–39.

decision concerning the transaction. In the Commission's competitive assessment, possible foreclosure of competing providers of digital music streaming apps is investigated.[248] The Commission has considered that there are serious doubts with the compatibility with the internal market due to potential foreclosure of competing providers of digital music streaming apps.[249] Additionally, the ability to use the customer information to put competitors at a competitive disadvantage is investigated.[250] Finally, the Commission concluded, that the transaction would not raise competition concerns in the EEA or any substantial part of it.[251]

4.3.1. Discussion

The potential and actual impact on competitors was investigated in the transactions discussed by the Commission. Often the concerns revolve around the transaction resulting to a state where there is a significant advantage post-merger. The Horizontal Merger Guidelines lists factors which can influence whether horizontal non-coordinated effects are likely to result from the merger.[252] Examples of the latter are the following, large market shares post-merger, the limited possibilities for customers to change suppliers when the merging companies are close competitors as well as the merger eliminating an important competitive force.[253] However, all of these factors do not need to be present in order to make significant non-coordinated effects likely.[254] Furthermore, the list is not exhaustive.[255] In order to conduct an assessment whether a transaction constitutes a significant impediment of effective competition pursuant to Article 2(3) EUMR, a comparison of the competitive

[248] Ibid. 8.4.2. P. 40.
[249] Ibid. (194) P. 40.
[250] Ibid. (ii) P. 45.
[251] European Commission. Mergers: Commission clears Apple's acquisition of Shazam. 2018.
[252] Case M.8788 – Apple/Shazam. 2018. (173) P. 36.
[253] Ibid.
[254] Ibid.
[255] Ibid.

conditions resulting from the concentration with the conditions that would have prevailed without the concentration must be made.[256]

Addressing the potential and actual impact on competitors is significant to assess whether the merger will have an adverse impact on effective competition or not. One of the important aspects here, when reflecting to the Apple/Shazam decision discussed above, is the statement that to assess whether a significant impediment of effective competition results from the transaction, the Commission must compare whether the conditions that would result from the concentration with the conditions that would have prevailed without the concentration. The Commission considering future changes that can be "reasonably predicted" will be discussed more in-depth later in this paper. The assessment of potential and actual impact on competitors is always dependent on the circumstances of the transactions and addressed case-by-case basis.

4.4. Innovation

The Commission's decision of the transaction Facebook/WhatsApp has discussed innovation concerns shortly. The investigation concerning barriers to entry introduces the discussion concerning the merged entity leveraging its market position.[257] The concerns would be the following: if the merged entity would raise its prices or stop innovating, the customers could easily switch to competing services that are available for free and provide new features as well as better quality services.[258] Here, the smothering of innovation post-merger is mentioned as a possible result of the proposed merger.

Moreover, the Commission's investigation concerning the transaction Google/Motorola has discussed the aspect of innovation as well.

[256] Ibid. (174). P. 37.
[257] Case No COMP/M.7217 – Facebook/WhatsApp. 2014. (94) P. 16.
[258] Ibid.

Google/Motorola transaction faced concerns around seeking of an injunction or the actual enforcement of an injunction against a good faith potential licensee, could significantly impede effective competition by forcing the potential licensee to agree to licensing terms it would not have agreed to in different circumstances.[259] Furthermore, concerns around the imposing of such licensing terms have been raised. It is argued that innovation and choice in the smart mobile devices industry could be seriously harmed by this kind of behavior and furthermore, this would result in the increase of the market share of smart mobile devices running on Google's Android OSs.[260]

The Commission's competitive assessment of the transaction between Microsoft and Skype discusses innovation.[261] Here, it is stated in the beginning that quality is a significant parameter of competition.[262] The important trend towards digitalization during the past years have been raised under discussion.[263] The parties have provided that the markets are characterized by innovation and that the innovation cycles are short resulting to the fact that software and platforms are constantly being redeveloped.[264] Here, the Commission states that the competition is innovation driven in the consumer communications services markets[265]

Innovation is briefly discussed in the investigation of the transaction between Google/Fitbit. Here, it was focused on Fitbit's ability to compete in innovation regarding smartwatches. The Commission stated that there are no competitive relationships leading to the reducing of Google's incentives to innovate in the future. Here, the Commission concluded that there are no competitive restrictions in innovation regarding the supply of smartwatches. Furthermore, the subject is left to that and not discussed further on.[266]

[259] Case No COMP/M.6381 – Google/Motorola Mobility. 2012. 107. P. 20.
[260] Ibid. 108. P. 22.
[261] Case No COMP/M. 6281 - Microsoft/Skype. 2011.
[262] Ibid. 81. P. 14.
[263] Ibid. 82. P. 14.
[264] Ibid. 82–83. P. 14–15.
[265] Ibid. 84. P. 15.
[266] Case No COMP/M.4731 – Google/ DoubleClick. (398) P. 90-91.

4.4.1. Discussion

Tech mergers harming and/or smothering innovation is a current and relevant discussion since innovation is a significant factor concerning tech acquisitions. In the technology sector, the markets can be innovation driven which can be concerning in circumstances where the transaction could lead to a limitation or harm of innovation. In the Commission's competitive assessment of the transaction Microsoft/Skype, innovation is discussed briefly. As stated earlier in this paper, it is concluded that certain markets, such as, consumer communications services are characterized by innovation and therefore, could be seen as innovation driven.

The most controversial decision here in the context of innovation would be the Facebook/WhatsApp transaction. However, in the Commission's assessment of the merger, innovation is discussed only briefly, and the focus of the competitive assessment is elsewhere. The transaction was cleared without any remedies imposed to the parties by the Commission.[267] The transaction was the first one examined by the Commission involving social networks.[268] Firstly, the merger would have never gone to the review of the Commission under EUMR since there has to be an EU dimension which thresholds are set in the Article 1 EUMR referring to the parties' turnover.[269] Furthermore, the referring parties invoked the referral mechanism in Article 4(5) of the EUMR allowing the parties to merger without an EU dimension.[270] Therefore, the parties submitted that the merger should be reviewed by the Commission.[271] This was before the new guidelines for Article 22 EUMR which allow mergers to be referred to the Commission for review solely based on the value of the company which could be seen reflected in its innovation.

[267] Giannino, M. The Social Network: The European Commission' Decision on the Facebook/Whatsapp Merger Case. (2016) Journal of the Internet Law. Vol, 19, N. 7. P. 14.
[268] Ibid.
[269] Ibid. P. 15
[270] Ibid.
[271] Ibid.

Could the traditional approach focusing on the market shares be seen as not appropriate when assessing the competition effects off mergers taking place in the digital markets?[272] Should the focus rather be on innovation since the markets are changing fast and the companies are competing through innovation?[273] Another transaction discussed under the innovation concerns section is the merger between Microsoft and Skype.[274] Here, the Commission has considered the digital markets before the Facebook/WhatsApp transaction, by weighting the relevance of the market shares of the parties to those transactions as a representative of their market power.[275] Furthermore, before the mergers Facebook/WhatsApp and Microsoft/Skype, the Commission have cleared unconditionally tech mergers where a fast pace of innovation existed and the products had a short cycle of life.[276] Finally, this shows that the Commission is ready to continue the regulatory route it has taken in Facebook/WhatsApp to other fast changing and dynamic markets where the main competition parameter is innovation.[277] In the digital markets, another important question has been whether there will be continued investment to the innovation of the acquired company post-merger.[278] The transaction between Facebook and WhatsApp raised concerns whether the customers could switch to competing services if innovation was reduced post-merger.[279] What has been recognized is that large players such as Facebook can lose their market share due to a reputational damage rather than to their innovation cycles.[280] What is similar here, with the transactions Facebook/WhatsApp and Microsoft/Skype is that in both of the assessments included the characterization of the markets as 'frequent market entry as well as short innovation cycles'.[281]

[272] Ibid. P. 17.
[273] Ibid.
[274] Ibid.
[275] Ibid.
[276] Ibid. P. 18.
[277] Ibid.
[278] Chirita, A. Theories of harm in "Data-Driven" Mergers. (2018) P. 4.
[279] Ibid.
[280] Ibid.
[281] Ibid.

Furthermore, in majority of the mergers, innovation has been a factor, however not the deciding factor in the Commission's competitive assessments. The competitive concerns around the transactions have been usually whether the transaction would restrict competition and potentially limit or harm innovation. The assessment of the innovation concerns has however been limited. Furthermore, innovation, killer acquisitions, and the new guidelines for Article 22 EUMR are discussed and analyzed in the context of tech mergers. The next chapter moves forward to the second part of the research question.

5. Tech mergers, killer acquisitions, and innovation in the future

This chapter will focus on tech mergers and innovation. The implications of the new guidelines for Article 22 EUMR are analyzed in the context of killer acquisitions and innovation. Furthermore, the Commission's capabilities of catching killer acquisitions as well as the effectiveness of the Commission's competitive assessments in the digital markets are investigated. This chapter aims to answer the second part of the research question on how well the Commission is, in the light of the new guidelines for Article 22 EUMR, able to identify as well as appropriately assess killer acquisitions? Furthermore, it is discussed whether the Commission should reconsider its approach to competitive assessment in the digital markets and shift its focus towards innovation in the future.

The new guidelines for the Article 22 EUMR are discussed first. The guidelines are fresh, so there is only so much data of their implications and use. The transaction Meta/Kustomer which is discussed above, is one of the cases after Illumina/GRAIL that the Commission has accepted under the Article 22 EUMR. However, in this case the transaction did meet the national merger control thresholds as well.[282] Furthermore, hypothetical examples have been set out of cases that the Commission may consider as suitable candidates for referral based on the new guidelines for Article 22 EUMR.[283] In the circumstances provided in example transactions, the turnover

[282] White & Case. European Commission publishes practical information for merging parties on how to seek guidance about Article 22 referral. 2022.
[283] Competition Policy. Practical information on implementation of the "Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases". Frequently Asked Q&A. P. 3.

thresholds of Articles 1(2) and 1(3) EUMR are not met, nor they require notification under national merger control rules of the Member States.[284] The first example is a multi-national company providing social networking services, where the target company has a fast growing base of monthly active users.[285] Here, the first example is pointing to the technology sector. Other sectors targeted in these examples are pharmaceutical and biotech inter alia.[286]

The article *"Mergers in the Digital Economy"* by Axel Gautier and Joe Lamesch provides a list of activities post-merger that can show that the acquired firm has discontinued its activities as they were before the transaction was completed.[287] By analyzing the circumstances post-merger of already completed transactions, a valuable information can be shown. For instance, whether there has been discontinuation of a product that the firms announce by themselves, whether websites are taken down, whether the website is still working but not offering any products further on and whether the firms announce that the support for these products have stopped.[288] What are the steps necessary to take to identify a killer acquisition? The article *"Mergers in the Digital Economy"* identifies the following steps: first, to have an acquisition in the firm's core segment where the acquiring firm enjoys a strong market position.[289] The second step would be to identify whether the acquired firm is a potential competitor. Here, the target firm would have to have a large user base to be considered as a potential competitor.[290] Companies that are developing for instance applications but have not attracted a crowd of users yet cannot be considered as potential competitors.[291] Additionally, the product of the target company should be

[284] Ibid. P. 4
[285] Ibid.
[286] Ibid.
[287] Gautier, A, Lamesch, J. Mergers in the Digital Economy. (2020) cesifo WORKING PAPERS. P. 25.
[288] Ibid.
[289] Ibid. P. 25.
[290] Ibid.
[291] Ibid. P. 25–26.

continued under its initial brand name.[292] Furthermore, the article mentioned above have created a table identifying acquisitions in the core segments that has been continued under their initial brand name.[293] Of one the acquisitions presented, where the target could represent a competitive threat to the buying firm because of its large user base, is the Microsoft/LinkedIn merger.[294] The transaction between Microsoft and LinkedIn is investigated in this paper as well. As mentioned above in the more in-depth analysis of the Commission's assessment on the transaction, the merger was cleared conditionally to compliance of series of commitments.[295] The Commission's assessment was focused on the fact that the parties of the transaction are primary active in complementary business areas.[296] Furthermore, a little overlap was recognized between the companies.[297] What can be concluded from the FAAMG companies' acquisitions is that most of the acquired products are discontinued after the transaction is clear and completed.[298] This leaves the question open whether the Commission is able to catch killer acquisitions since a lot of the time, mergers between technology companies that are referred to the Commission for review are cleared. What happens post-merger, is what is relevant for the effective competition and innovation in the future.

The Article *"Killer Acquisitions in Digital Markets"* discusses the potential competition theory of harm.[299] This would help to identify the loss of innovation without considering the uncertainty that exists, more specifically, whether the product that is under development will compete with the existing product or whether the product will reach the market.[300] It is also stated that start-up firms rather engage in alternative product innovation than in head-on

[292] Ibid. P. 26.
[293] Ibid.
[294] Ibid.
[295] Ibid.
[296] Ibid.
[297] Ibid.
[298] Ibid. P. 27.
[299] Turgot, C. (2021). Killer acquisitions in digital markets: evaluating the effectiveness of the eu merger control regime. European Competition and Regulatory Law Review (CoRe), 5(2). P. 114.
[300] Ibid.

competition.[301] Furthermore, the competitive analysis could have its focus on innovation instead of anti-competitive foreclosure. Therefore, an analysis where the innovation is seen as the value, could be considered more appropriate than analysis based on the output market which was considered in the Facebook/WhatsApp decision.[302]

The harm or loss of potential competition is important when considering a large player acquiring a start-up firm.[303] There are currently ways to overcome these issues under the Horizontal Merger Guidelines, however the focus of the assessments is rather on the existing market structure than on potential or approaching competition.[304] Additionally, the question relevant here is whether killer acquisitions promote or prevent competitive innovation. There are not many cases where the Commission has intervened based on innovation.[305] Since killer acquisitions can be considered as an acquisition of a potential competitor, one of the most important aspects investigated when trying to figure out whether the transaction in hand could be considered a during the reviewing of the merger by the Commission is to identify whether the parties could be considered as a potential competitor.

The new guidelines for Article 22 EUMR which have been introduced more in-depth in the background chapter, will most likely bring traffic to the referral mechanism of the Commission in the future. Since after the updated referral mechanism the importance of a company can be seen elsewhere rather than only in its turnover. Considering the relevance of innovation and rapidly advancing technology, the importance of a newfound start-up with new technology could be seen in its innovation. Furthermore, a transaction could be referred to the Commission for review based on innovation concerns. In the context of tech mergers, these factors are significant since to a new

[301] Ibid.
[302] Ibid.
[303] Turgot, C. (2021). Killer acquisitions in digital markets: evaluating the effectiveness of the eu merger control regime. European Competition and Regulatory Law Review (CoRe), 5(2). P. 113.
[304] Ibid.
[305] Ibid.

innovative start-up company the innovation is the key driver. Therefore, under the new guidelines for Article 22 EUMR the transaction could be reviewed by the Commission and the possible competitive constraints of the transaction can be assessed, including innovation. There have been discussions around killer acquisitions and whether the new guidelines are the solution to the phenomenon. However, the guidelines are still very fresh, and therefore, there is not enough data to fully make a conclusion on the subject. Moreover, even if the transactions are referred to the Commission solely based on innovation, is the Commission able to recognize killer acquisitions and assess them appropriately. The effectiveness of the merger review procedure is addressed in the next section more in-depth.

5.1. The Effectiveness of the Merger Review Procedure in the technology sector

After the new guidelines for Article 22 EUMR, the referral mechanism could be seen as more value based. The importance of the company is no longer only reflected in its turnover. This leaves the door open for basically any transaction to be referred to the Commission for review. Start-up companies may be more attracted to grow their customer base in the beginning rather than their turnovers.[306] The acquisition of WhatsApp by Facebook, that is discussed in this paper, can be seen as an example of the financial importance of the transaction since without the referral from CMA, it would not have been reviewed by the Commission at all.[307] This was before the new guidelines for Article 22 EUMR. The first transaction blocked by the Commission in accordance with the new guidelines, the proposed

[306] Ibid. P. 118.
[307] Ibid.

Illumina/GRAIL merger, provides a precedent. Furthermore, in the Illumina/GRAIL decision, the Commission can be seen as addressing the issue of killer acquisitions. The new mechanism proposes its own problems for further on, one of them being legal certainty.[308] The issue of legal certainty is not discussed further on in this paper since the focus here will be the capability of the Commission to catch killer acquisitions in the technology sector through its reviewing procedure.

The remedies imposed by the Commission are discussed next. Some of the mergers assessed earlier in this paper the has been cleared only conditionally by the Commission. The Commission may pose behavioural commitments to restrict the ability to combine user data post-merger, for instance.[309] Here, the Google/Fitbit decision provides an example of the effectiveness of behavioural commitments.[310] In the transaction, the question was the data collection capabilities of concerning Fitbit's health data to enter the health market.[311] The decision was the first time when the Commission used "data silo" for Google not to combine health data with its online advertising data.[312] Could extensive remedies be one solution to addressing future concerns with mergers including innovation?

The biggest issue with the investigations of the acquisitions of nascent firms is the formation of the expectation of what would happen in circumstances where the merger would not happen.[313] According to OECD, the relevant framework to consider these issues is likely to be the same as when addressing any other mergers. The standard questions in regard with the target company would include the following: "*Would the target be likely to remain independent, and if so, how strong a competitive constraint would it pose and would the target be likely to be purchased, albeit at a lower price, by an*

[308] Ibid.
[309] Ibid. P. 120.
[310] Ibid.
[311] Ibid.
[312] Ibid.
[313] OECD. 'Start-ups, Killer Acquisitions and Merger Control - Background Note. By the Secretariat. 2020. 43 P. 16.

alternative acquirer, and if so, how strong a competitive constraint would it pose?"[314] Additionally, the relevant counterfactual will be dependent on the likelihood of disruptive entry by a third party as well as the likelihood of the acquiring firm to purchase another firm, or internally develop its own capabilities to produce similar product as the nascent firm's product.[315] Predicting the future with complete certainty is impossible. Therefore, any prediction made will always have a speculative element as well as leave a certain level of uncertainty. How to know how the firms will act in the future? How to know whether the firms are going to act one way or the other? The discussion here cannot go around the speculative element of the future analysis.

The framework for assessing killer acquisitions is discussed next. First, it is necessary to point out the difference between the killer acquisition theory of harm and potential competition theory of harm.[316] Here, the difference is that where killer acquisitions are in question the merger creates an incentive, to remove the future competitive pressure created by the product of the target company as well as to remove the product itself from the market.[317] One problem is assessing whether an anticompetitive acquisition of a nascent firm is a killer acquisition as well.[318] What is relevant here, is the intent as well as the factors affecting the incentive to implement such a strategy.[319]

The following will discuss the substantive criteria for the assessment of mergers shortly.[320] The approach to the substantive assessment of mergers is moving towards evolution.[321] The substantive criteria for the assessment of mergers have focused on static efficiencies analysis, focusing on whether the

[314] Ibid.
[315] Ibid. 44 P. 16.
[316] Ibid. 96. P. 27
[317] Ibid.
[318] Ibid. 4.2.4.
[319] Ibid. 105. P. 28.
[320] Faria, T, Martins, M, Nnunes, M. New Trends in Merger Control: Capturing the so-called Killer Acquisitions… and everything else. (2023) Actualidad Jurídica Uría Menéndez. P. 50.
[321] Ibid.

merger will result in static loss of competition between the companies.[322] Regardless of the fact that the big tech mergers have been cleared by the Commission, some of the transactions required extensive remedies.[323] Furthermore, antitrust authorities have intervened based on innovation concerns during the recent years.[324] Therefore, there has been a shift towards innovation based assessment by the antitrust authorities.

[322] Ibid.
[323] Ibid.
[324] Ibid.

6. Conclusion

This chapter will present the findings of the paper with the objective to answer the following research questions: What can be learned from the Commission's assessments of big tech mergers and how well equipped the Commission is, in the light of the new guidelines for Article 22 EUMR, to identify as well as appropriately assess killer acquisitions? Should the Commission reconsider its approach to competitive assessment in the digital markets and shift its focus towards innovation in the future?

The conclusion starts by aiming to answer the first part of the research question concerning the lessons learned from the Commission's assessments concerning the analyzed tech mergers, limited to the competition concerns analyzed and discussed in this paper. The competitive assessments of the transactions of the Commission are aiming to ensure that the mergers would not have an anticompetitive impact or harm to the competition. It is inevitable that the Commission has a huge role in the assessment of the tech mergers as well as ensuring effective competition that is in accordance with the EUMR. The Commission's decisions of the mergers produce valuable observations on the competitive landscape as well as the potential competitive concerns in the digital markets. The merger review process conducted by the Commission is aiming to identify and assess potential harm to competition resulting from a merger. The implications of the investigated mergers to the technology sector are dependent on the competition concerns, market dynamics as well as the remedies imposed. It can be concluded that the FAAMG companies use acquisitions to develop their business as well as conquer new territories in the markets. Usually, the acquired firms are complementary to the services the big companies already offer. The future of the concentration is relevant here. What will happen after the merger. Analyzing the potential effects of a merger can only go so far, and the Commission's assessment concerning potential harm to competition are always dependent on the actual activities of the parties' post-merger. This leaves open the question on how can the

Commission know what will happen? How to predict the actions of the firms in the future?

The Commission's decisions show that there are tools to investigate the impact of the transaction to the markets. Assessing the market position, data collection capabilities, impact on potential and actual competitors as well as innovation concerns are significant in the competitive examination. The assessment of the mergers is usually based on the current market structure. However, when the digital markets can be characterized as fast changing and innovation driven, it may not always be as effective way to assess such mergers as it would be in a different sector. However, the Commission's investigation show, that the competitive assessments have followed the traditional route during the past years with the big mergers. Regardless, the innovation has been brought up more. Discussion of innovation-based assessment has been present when concerning tech mergers, especially when the acquiring company is one of the biggest technology companies in the world. Furthermore, as seen in the Commission's assessments concerning the transactions, there is not much analysis based on the innovation as a value factor for the acquired companies. Does the Commission have the tools to analyze innovation concerns effectively? Would shifting approach and focusing on the innovation make a difference in the results of the assessment? Would it bring additional problems and leave the assessment overly speculative and uncertain? Extreme to one way or the other is not necessarily effective. The increasing discussion around innovation concerns in big tech mergers as well as the fast-changing digital markets require some changes in the traditional competitive assessment. Focusing on the current market structure may not be beneficial when assessing mergers happening in fast changing and innovation driven markets. However, shifting the focus on the future will be uncertain and speculative. The parameter of analyzing future changes that can be "reasonably predicted" might be difficult considering the characterization of digital markets. How can the Commission know, especially when the strategy and objective of start-up companies can be innovation, how the company will act in the future and how the markets are

responding? Is the Commission able to recognize, where the innovation is a relevant factor to assess? Could part of the solution here to be implementing certain conditions to safeguard innovation in the future transactions in the technology sector? Furthermore, could that accompany additional problems and difficulties in the implementation of the commitments, especially when they are breached by the parties.

The conclusion moves forward to discuss possibilities for the future. The questions introduced in this paper are often left open since the future can only be predicted so far. Technology is advancing rapidly, and innovation is an ongoing trend in the digital markets. Since the advancement of technology seems to open doors to new ideas and innovations, it is impossible to predict the markets with complete certainty. Here, one important aspect when trying to analyze the future is to try to recognize the company's incentive. Intent plays a huge part in the assessment. It is relevant to assess circumstantially what would it mean for the markets if a certain activity happens, and it is relevant to balance the results with whether the company or companies have the incentive to conduct such activities. A hypothetical example could be when a company would be active on one market, where it would not be in direct competition with the company it is merging with, whether it has the incentive and goal to enter the market where it would become a competitor with the merging party and therefore, in the absent of the merger they would be in competition with each other. Here, the incentive to enter the new market is relevant when assessing the possible effects. However, it is difficult to base an assessment on such speculative future analysis. Regardless, the assessment is always dependent on the individual circumstances of the transactions such as the market dynamics and the companies' characteristics.

The second part of the research question concerns how well the Commission is equipped to identify as well as appropriately assess killer acquisitions in the light of the new guidelines for Article 22 EUMR, reflecting to the merger decisions and the results of the analysis conducted above. Lastly, the conclusion will discuss whether the Commission should reconsider its

approach to competitive assessment in the digital markets and shift it more towards innovation in the future. The new guidelines for Article 22 EUMR provide an insight to the Commission's approach towards merger control. The renovation of the referral procedure shows that the Commission recognizes that there have been issues with the traditional referring system. In practice, it is a statement from the Commission, that the phenomenon of killer acquisitions is recognized and that they are looking for ways to capture them. Renovating the procedural aspect is however not drawing the lines straight. Will the update of the procedural system need a following update to the competitive assessments conducted? If killer acquisitions are caught by the reviewing process, the problem remains, if they are not captured in the competitive assessments of the Commission and the transactions are cleared as they have been. Is banning transactions any better solution to this? Or could extensive commitments in a conditional clearance of the merger bring a solution to the issue?

After the new guidelines for Article 22 EUMR, the procedural aspect should in theory be in condition where potential killer acquisitions can be referred to the Commission regardless of the turnover thresholds. However, it is dependent on the investigations the Commission conducts after the transaction is referred for the review. Especially cases, where innovation is the main driver, and the importance of the target company could be seen reflected in its innovation rather than turnover. Here, the impact of the innovation to the effective competition and whether the transaction could potentially harm or smother innovation should be the primary focus of the investigation. Before the new guidelines for Article 22 EUMR, killer acquisitions escaped the Commission's reviewing process since they did not meet the turnover thresholds. Now, regardless of the turnover, different factors such as innovation can be the element bringing a transaction under review, can killer acquisitions still escape if the Commission is not able to recognize them appropriately? The following years will provide important data on the Commission's assessment of future mergers. Whether the Commission continues to base its assessment on the traditional factors or shift

the focus more on innovation when concerning mergers in the technology sector is left open for us to see. Illumina/GRAIL transaction being the first one banned under the new guidelines for Article 22 EUMR provides an example from the pharmaceutical sector of the Commission's approach towards the transactions referred after the renovation of the referral mechanism. In either case, innovation will be under discussion since now after the new guidelines for Article 22 EUMR and the DMA, there will be an increasing number of referrals of transactions to the Commission where the value of the acquired company could be reflected in its innovation rather than its turnover. The digital markets are innovation driven as well as fast changing and the transactions may require assessment with the focus on innovation to conduct an appropriate examination of the competitive effects. Furthermore, it can be stated that the Commission has provided signs that it has recognized killer acquisitions which can be seen through the implementation of the new guidelines for Article 22 EUMR and the shift towards identifying the target company's value in its innovation rather than its turnover. The increasing number of referrals results in more competitive assessments which will provide more important data concerning the Commission's approach towards mergers where the focus is on innovation. Furthermore, the Commission's ability to predict activities post-merger remains uncertain and therefore, the Commission's analysis of innovation as a value factor is limited. Finally, it can be concluded that the Commission has made progress in recognizing killer acquisitions through the renovation of the referral mechanism, but the competitive assessment of innovation driven mergers requires further improvements.

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