

DMW's Contribution to Merger Guidelines Review

Public Consultation

Introduction

Digital Merger Watch welcomes the opportunity to contribute to the European Commission's initiative of the Review of the Merger Guidelines. Digital Merger Watch (DMW) is a global network of civil society and research organisations with the objective to prevent potentially harmful mergers in digital markets. While some of our network members will provide individual responses to the consultation(s), we would like to share our coordinated position regarding the review of the merger control in digital markets. For more detailed information including our members and previous work, please refer to our webpage.¹

We believe that a new, dynamic, and comprehensive enforcement of the EU Merger Regulation is fundamental and that the review of the Horizontal Merger Guidelines (HMG) and Non-Horizontal Merger Guidelines (NHMG) is a great opportunity for the European Union to critically assess and prevent further concentration of EU markets and to facilitate innovation that reflects the European Union's fundamental values rather than being undermined by big corporations.

This submission first evaluates the consequences and trends in the enforcement of EU Merger Regulation since its enactment. The second part outlines our general recommendations, and the third part specifically addresses nascent competitor acquisitions with a view to strengthening EU Merger Regulation enforcement through updated guidelines.

1. Evaluation of EU merger control in the last 20 years

This section reviews the track record of the EU Merger Regulation (EUMR)² since its enactment in 2004. Notably only a very small fraction of concentrations are notified to the European Commission ('Commission'). For example, S&P estimates that more than 12,000 mergers were finalised in Europe (including the UK) in 2023³ while only 356 mergers were notified to the Commission.

As of the time of writing, a total of 7,354 merger notifications have been submitted to the Commission since the EUMR entered into force.⁴ Of these, only 176 cases (2.39%)

¹ <https://www.somo.nl/digital-merger-watch/>

² Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)

³ See, S&P Global Market Intelligence, Europe M&A by the Numbers: 2024 in Review, <https://pages.marketintelligence.spglobal.com/rs/565-BDO-100/images/europe-ma-by-the-numbers-2024-in-review.pdf?version=0>

⁴ Based on data up to 31 July 2025. EUMR came into force in 2004 May. However, as we have statistics only per year, the mentioned statistics will include the period from 1 January 2004 to 1 May 2004

proceeded to an in-depth Phase II investigation, and only 15 mergers (0.2%) were ultimately blocked. Ultimately, the Commission approves almost 99.9% of notified mergers—either unconditionally or with commitments. Therefore, any suggestion of overenforcement of the EUMR is factually incorrect and misleading. Coupled with increasing concentration, this is not the moment to weaken merger enforcement.⁵ The real mistakes of the past lie not in the mergers where the Commission intervened, but in those where it failed to intervene or did not impose appropriate remedies.

It is important to interpret these statistics within a context of broader economic trends, especially the increasing concentration, markups, and widening gaps between so-called “global superstars” and the rest of the firms. Recent research on U.S. markets has revealed rising market markups and growing market power,⁶ accompanied by a decline in business dynamism.⁷ This trend is not unique to the US, as it can be observed in the UK⁸ and in the EU. A recent report published by the Commission states that (i) concentration at both industry and market level has increased, (ii) markups and profits in particular at the top of the distribution increased, (iii) the gap between leaders and followers increased and (iv) business dynamism declined.⁹ In addition, the report points to rising M&A activity as a contributing factor to these trends, a view confirmed by other studies.¹⁰

While these economic indicators indicate an overall problematic trend, weak merger control in digital markets has undermined many of the promised benefits of the digital economy due to its inability to keep markets fair, open, and contestable. Specifically, merger control in digital markets has failed to block the anti-competitive acquisitions of startups. For instance, recent research by Digital Merger Watch and SOMO revealed that between 2019 and 2025, Big Tech firms—Alphabet, Amazon, Apple, Meta, and Microsoft—acquired at least 191 companies including startups active in AI and cloud markets.¹¹ Furthermore, 27 of these were European companies, exacerbating concerns that these mergers negatively impacted innovation within the EU. However, the Commission investigated only eight of these mergers and four went to Phase II investigation, and just one merger, Amazon’s acquisition of iRobot, was ultimately withdrawn following objections raised by the Commission. Alarming, nearly two-thirds of the 191 acquired companies shut down their websites after acquisition, with some even ceasing to serve customers and business users altogether. Therefore, it is crucial

⁵ Koltay, Gábor, Szabolcs Lorincz, and Tommaso Valletti. “Concentration and competition: evidence from Europe and implications for policy.” *Journal of Competition Law & Economics* 19.3 (2023): 466-501.

⁶ Jan De Loecker, Jan Eeckhout, Gabriel Unger, The Rise of Market Power and the Macroeconomic Implications, *The Quarterly Journal of Economics*, Volume 135, Issue 2, May 2020, Pages 561–644, <https://doi.org/10.1093/qje/qjz041>; also see Kwon, Spencer Y., Yueran Ma, and Kaspar Zimmermann. 2024. “100 Years of Rising Corporate Concentration.” *American Economic Review* 114 (7): 2111–40

⁷ See: Akcigit, Ufuk, and Sina T. Ates. “What happened to US business dynamism?.” *Journal of Political Economy* 131.8 (2023): 2059-2124.

⁸ The State of UK Competition Report 2024, <https://www.gov.uk/government/publications/the-state-of-uk-competition-report-2024/the-state-of-uk-competition-report-2024>

⁹ European Commission: Directorate-General for Competition, *Protecting competition in a changing world – Evidence on the evolution of competition in the EU during the past 25 years*, Publications Office of the European Union, 2024, <https://data.europa.eu/doi/10.2763/089949>

¹⁰ Stiebale, Joel, and Florian Szücs. “Mergers and market power: evidence from rivals’ responses in European markets.” *The RAND Journal of Economics* 53.4 (2022): 678-702.

¹¹ SOMO, Big Tech acquires a company every 11 days, <https://www.somo.nl/big-tech-acquires-a-new-company-every-11-days/>

that the Commission rigorously scrutinises such deals, and acts proactively, imposing remedies or blocking mergers where necessary. Strong merger enforcement is essential to safeguard competition, protect consumers, ensure privacy and autonomy, uphold freedom of expression, defend workers' rights, strengthen resilience, safeguard digital sovereignty¹² and ultimately serve the public interest.

The weaknesses of digital merger review under the EUMR can be attributed both to jurisdictional thresholds in the EUMR, as well as to the substantive theories of harm and methodologies applied in defining markets, assessing market power, and identifying overlaps. Although jurisdictional thresholds have been the subject of discussion regarding the revision of EUMR for some time,¹³ we understand that this current review doesn't include the revision of the EUMR. Therefore, we will limit our comments to the enforcement of legal rules and, accordingly, to the Guidelines. That said, we urge the Commission to seek feedback and initiate a process that would enable it to review below-threshold mergers, without relying on national competition authorities under Article 22 of the EUMR. This would help establish an EU-wide one-stop shop and a uniform European approach to prevent the loss of innovation in startup acquisitions.

2. Towards a new approach to digital mergers

Digitalisation has introduced new challenges to merger control, necessitating detailed guidance from the Commission in the form of updated Merger Guidelines. Several factors can cause markets to tip, including extreme returns to scale, network externalities, and the role of data leading to monopolies or oligopolies forcing consumers to remain locked in walled ecosystems.¹⁴ These characteristics of digital markets make it difficult for new entrants to enter, grow, and ultimately challenge the dominant position of incumbents. The Merger Guidelines should reflect these changing market conditions. Below we set out a number of these challenges and corresponding proposals for revisions to the Guidelines to address them.

Market definition and ecosystems: In digital markets, large companies build ecosystems by connecting products not just vertically or horizontally, but also from adjacent markets. Therefore, an exclusive focus on a narrow market definition fails to capture where competition happens.¹⁵ Besides, distinguishing between horizontal and non-horizontal mergers is not always feasible, especially when it comes to digital ecosystems. The Commission cannot assess digital markets in isolation but must instead consider the interrelatedness and interconnections within ecosystems. This requires the inclusion of digital ecosystems in its analysis and we note that the Commission has already taken some

¹² Bria, Francesca, Paul Timmers, and Fausto Gernone. "EuroStack—A European alternative for digital sovereignty." (2025).

¹³ In 2016, the European Commission sought feedback on whether there is an enforcement gap under the EU merger control. See https://ec.europa.eu/commission/presscorner/detail/en/ip_16_3337

¹⁴ See European Commission: Directorate-General for Competition, Montjoye, Y.-A. d., Schweitzer, H. and Cr  mer, J., *Competition policy for the digital era*, Publications Office, 2019,

¹⁵ See Michael G Jacobides, Ioannis Lianos, Ecosystems and competition law in theory and practice, *Industrial and Corporate Change*, Volume 30, Issue 5, October 2021, Pages 1199–1229, <https://doi.org/10.1093/icc/dtab061>

steps in this regard with the new Market Definition Notice.¹⁶ The concept of the ecosystem has also been acknowledged by the EU Courts.¹⁷ The current NHMG focuses on tying and bundling is insufficient to capture other theories of harm in the context of ecosystem competition, such as self-preferencing, reduced interoperability or the leveraging data from one market to adapt the offering in other markets. Such an ecosystem approach can be built on the recent digital merger cases initiated by the Commission in its prohibition of the proposed Booking/eTraveli merger¹⁸ and its review of the proposed — but later abandoned — Adobe/Figma merger.¹⁹

- ★ The new Guidelines should enable the use of ecosystem theories of harm which considers the interrelatedness and interconnectedness between different products and services.

Parameters of competition in digital markets: The current guidelines predominantly focus on prices, but this doesn't necessarily reflect the true nature of competitive dynamics. For example, the current Guidelines use “increased prices” as a term to include concerns related to price, choice, quality, and innovation.²⁰ However, innovation, quality, privacy, health, environment, choice, pluralism²¹ and diversity²² can be the primary metrics of healthy competition in digital markets and shouldn't be consigned to a secondary role behind prices. This is especially true in markets where users significantly improve the products with their attention, data, and content creation.

- ★ A greater emphasis on non-price aspects of competition should be given in the new Guidelines.

Measuring competition: One of the aspects of the Guidelines that deserves an overhaul is the reliance on the Herfindahl-Hirschman Index (HHI). The guidelines state that the Commission often applies the HHI to measure competition and, in particular, to identify mergers that are unlikely to raise concerns.²³ However, the HHI is not a suitable stand-alone tool for measuring competition—neither in digital markets nor in traditional ones, and should be complemented with other measures, including pricing indicators such as markups and structural indicators such as, choice and diversity. In particular, sole reliance on the HHI might categorise certain mergers as unproblematic when instead they deserve more detailed scrutiny. Limitations of over-reliance on the HHI include it underweighting smaller

¹⁶ Communication from the Commission – Commission Notice on the definition of the relevant market for the purposes of Union competition law, C/2023/6789

¹⁷ See Google Android (Case T-604/18) paras 114-116

¹⁸ European Commission Press Release, Mergers: Commission prohibits proposed acquisition of eTraveli by Booking, Case M.10615

¹⁹ See Adobe/Figma part at European Commission: Directorate-General for Competition, *Competition merger brief. Issue 2/2024, September*, European Commission, 2024, <https://data.europa.eu/doi/10.2763/7278586>

²⁰ HMG para 8

²¹ See Google Android (Case T-604/18) para 1028

²² For example see, European Commission's description of Topic A: Competitiveness and resilience para 16

²³ HMG para 16, 19-21

firms, as well as it ignoring product and business differentiation, market dynamism and geographic variation.²⁴

Its limitations are especially pronounced in digital markets, where the competitive pressure exerted by small firms plays a particularly vital role and, hence, could fail to meet the HHI thresholds while being relevant for competitive dynamics. As Advocate General Kokott emphasised, “[E]specially on markets with high barriers to entry, where competition is already weakened because of the presence of the dominant undertaking, the latter [i.e. currently less efficient firms] can play an important role in serving the object of maintaining competition”.²⁵ The HHI is a measure of market concentration, whereas considering market diversity could enable the Commission to better account for other dimensions of competition, particularly concerns related to diversity of the value chain and output in order to meet varying user preferences and ensure consumer choice.²⁶ The HMG currently focus on recent entry (20a) and innovation (20b), but there should be scope to include other benefits of competition that are ill-served by reference to market share. The Commission recently considered such dynamics when emphasising the importance of diversity and plurality in Vivendi/Lagardere.²⁷ Similarly, in the media sector,²⁸ new Guidelines should align with the European Media Freedom Act (EMFA) by treating diversity of actors as a key assessment factor, ensuring EMFA’s goals are not undermined by conflicting decisions in upstream or after markets, or any other related digital market.

- ★ When assessing competition, broader indicators such as markups, diversity, choice, and pluralism should be used, rather than relying primarily on narrow measures like the HHI.

Timeliness of interventions: Incumbent firms are known to leverage their access to key resources (such as data, computational infrastructure, financial resources, and talent) from their core businesses to shape and dominate adjacent markets. This should not be conflated with the competitive emergence of nascent technologies. A clear example of this can be seen in AI development. Digital incumbents, with their access to key resources and established user bases, can quickly capture market power and foreclose opportunities for others. As a result, digital incumbents have been absorbing a technology that may have had the potential to challenge them. This strategy has effectively stifled disruptive innovation and confined it to incremental improvements mostly of existing products that pose no real threat to the gatekeepers’ dominance. These firms have shaped the AI application market in a way that allows them to reap benefits even without owning every layer of the value chain.²⁹

²⁴ Davies, Todd, Market Diversity and Market Churn: Measures of Competitive Structure (March 19, 2025). Available at SSRN: <https://ssrn.com/abstract=5185363> or <http://dx.doi.org/10.2139/ssrn.5185363>

²⁵ AG Kokott Opinion, *Google Android* (Case C-738-22) para 136 [clarification added]

²⁶ Davies, Todd, Market Diversity and Market Churn: Measures of Competitive Structure (March 19, 2025). Available at SSRN: <https://ssrn.com/abstract=5185363> or <http://dx.doi.org/10.2139/ssrn.5185363>

²⁷ See Vivendi/Lagardère, Case M.10433

²⁸ For example, see Dutch Authority for Consumers and Markets’ decision on DPG/RTL merger <https://www.acm.nl/en/publications/acm-attaches-strict-conditions-acquisition-rtl-nederland-dpg-media>

²⁹ See Rikap, C. (2024) ‘Varieties of corporate innovation systems and their interplay with global and national systems: Amazon, Facebook, Google and Microsoft’s strategies to produce and appropriate artificial intelligence’, *Review of International Political Economy*, 31(6), pp. 1735–1763, SOMO, “The real winners of the AI race”, <https://www.somo.nl/the-real-winners-of-the-ai-race/>, AI Now Institute,

Therefore, when determining the appropriate timeframe for intervention in nascent markets, the Commission should distinguish between markets where adjacent players can leverage existing resources (such as data, talent, capital, or computing power) and those where all players compete on a level playing field. Further the Commission should not hesitate to act when incumbents from adjacent markets create uneven competition. This requires regulatory intervention in markets before they tip, using key tools including injunctive remedies and merger control, given the cost of restoring competition is much higher after a market has tipped. Reversing consummated mergers tends to be more complicated and less effective than blocking them at the outset, especially in concentrated digital markets.³⁰ The social costs of an incorrect clearance are significantly higher in digital markets, reinforcing the need for a more proactive and interventionist regulatory approach.³¹

- ★ The new Guidelines should prioritise vigorous enforcement over a wait-and-see approach in markets prone to tipping and leveraging practices.

Innovation defence and scale as efficiency: Draghi report³² emphasizes the role of innovation defense and scale as efficiency arguments. In digital markets, high entry barriers make scale crucial for rivals seeking to challenge incumbents. Yet, like all efficiency defenses, claims of scale and innovation risk speculation and misuse. The Commission must therefore reject such arguments when they justify further concentration by dominant firms or reinforce market power, and remain vigilant against accepting them in exchange for behavioral remedies that are difficult to monitor or reverse. Such arguments may only yield procompetitive effects in markets that are not concentrated and where the merging parties lack significant market power.

- ★ Scale and innovation claims should be rejected when they justify further concentration or entrench the market power of dominant firms.

The magnitude of potential harm should be considered alongside its probability: The test laid down in the EUMR requires the Commission to find a significant impediment to effective competition. A recent judgement by the CJEU clarified that the Commission must demonstrate that the proposed merger *more likely than not* would significantly impede effective competition in the market.³³ However, a strict interpretation of this test is likely to be counterproductive in highly concentrated markets such as digital markets. When markets are prone to tipping and there is no effective level playing field for entrants and when entrants have the potential to grow rapidly, protecting the innovation efforts of entrants becomes

"Heads I Win, Tails You Lose: How Tech Companies Have Rigged the AI Market"

<https://ainowinstitute.org/publications/2-heads-i-win-tails-you-lose-how-tech-companies-have-rigged-the-ai-market> and Widder, David Gray and Kim, Nathan, How Big Cloud becomes Bigger: Scrutinizing Google, Microsoft, and Amazon's investments (2025), <http://dx.doi.org/10.2139/ssrn.5377426>

³⁰ Kwoka Jr, John E., and Tommaso M. Valletti. "Confronting Consummated Mergers: An Inquiry into Policy and Practice." *Available at SSRN 5331487* (2025).

³¹ Argentesi, Elena, et al. "Merger policy in digital markets: An ex post assessment." *Journal of Competition Law & Economics* 17.1 (2021): 95-140.

³² Draghi, Mario. "The future of European competitiveness part A: A competitiveness strategy for Europe." (2024). Part B pg.299

³³ See CK Telecom (Case-376/20), para 87

extremely important.³⁴ In this context, the acquisition of startups by incumbent firms in digital markets may pose significant risks, even when the likelihood of harm is less than 50%. Indeed, similar recommendations have been made in the UK.³⁵

- ★ The new Guidelines consider not only the probability but also the potential magnitude of harm—a balance of harm approach.

Reversal of the burden of proof: As discussed above, market power, markups, and concentration have increased while the merger enforcement remained ineffective in preventing them. Therefore, it is essential for the Commission to shift its focus from effects-based analysis to a workable and effective competition analysis that can demonstrably tackle the challenges and pressures of a tendency towards market concentration. Such an approach would rely on strong rebuttable presumptions in certain cases — for example, where a dominant firm is involved or there is a significant increase in concentration — treating those mergers as illegal unless the merging parties can demonstrate that the merger is procompetitive.³⁶ Digital incumbents enjoy extensive access to data and advanced analytical tools. By contrast, the Commission's resources are scarce and its access to data—both in scope and quality—remains severely constrained. As such, incumbents enjoy a clear informational advantage, both vis-a-vis the Commission, but also other market participants.³⁷ To address this imbalance, we strongly urge the Commission to adopt a reversal of the burden of proof, requiring merging parties to submit sufficient and reliable information that the proposed merger is procompetitive as a condition for approval.³⁸ Therefore, the burden should be placed on the merging party who has an informational advantage when it comes to analysing the competitive structure of the market.³⁹ If merging parties cannot establish that the merger would create procompetitive effects, no one else can.⁴⁰

- ★ The new Guidelines should adopt reversal of burden of proof targeting acquisitions by dominant companies and acquisitions in concentrated markets.

Effects on labour markets: We believe it is important to discuss the effects of digital mergers in labour markets. In that sense, we welcome the recent infringement decision against Delivery Hero and Glovo for their participation in a food delivery cartel.⁴¹ The case is

³⁴ See High-impact, low-probability events (HILP) events, Ioannis Lianos, Polycentric Competition Law, *Current Legal Problems*, Volume 71, Issue 1, 2018 pg.195

³⁵ Furman, Jason, et al. "Unlocking digital competition: Report of the digital competition expert panel." UK government publication, HM Treasury 27 (2019). Recommended action 10

³⁶ Lancieri, Filippo, and Tommaso Valletti. "Towards an effective merger review policy: a defence of rebuttable structural presumptions." *Oxford Review of Economic Policy* 40.4 (2024): 763-775.

³⁷ Motta, Massimo, and Martin Peitz. "Removal of potential competitors—a blind spot of merger policy?" *Competition Law & Policy Debate* 6.2 (2020): 19-25.

³⁸ See Motta, Peitz (2020); and Tommaso Valletti, "How to Tame Big Tech Giants: Reverse the Burden of Proof in Merger Reviews,

<https://www.promarket.org/2021/06/28/tech-block-merger-review-enforcement-regulators/>

³⁹ Mario Mariniello, "Reinforcing EU merger control against the risks of acquisitions by big tech" Bruegel,

<https://www.bruegel.org/policy-brief/reinforcing-eu-merger-control-against-risks-acquisitions-big-tech>

⁴⁰ Lancieri and Valletti (2024)

⁴¹ European Commission Press Release, Commission fines Delivery Hero and Glovo €329 million for participation in online food delivery cartel, https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1356

particularly noteworthy as the anticompetitive conduct was facilitated by Delivery Hero's minority stake in Glovo, which eventually increased to a decisive influence over Glovo. The gradually increasing influence of Delivery Hero over Glovo enabled the merging parties to reduce the welfare of workers. This case underscores that the analysis of digital mergers should go beyond effects on consumers. The Commission should recognise that mergers can have immediate and direct consequences for workers, while any potential benefits to customers are often more uncertain.

- ★ The new guidelines should also consider the impact of digital mergers on labour markets.

Inclusion of behavioural economics and financial analysis: One of the shortcomings with the current guidelines and merger enforcement was the exclusive reliance on industrial organisation (IO economics), which resulted in a significant decrease in enforcement⁴² and allowed anticompetitive deals to proceed, while failing to reflect actual consumer and firm behaviour.

The assessment of competition and competitive dynamics needs to also be informed by other branches of economics and other disciplines. Developments in behavioural economics demonstrate that individuals do not always make rational choices, where rational is understood as the maximisation of the expected individual utility.⁴³ Indeed, the findings of behavioral economics are confirmed by courts on both sides of the Atlantic, for example, the Microsoft decision in the EU⁴⁴ and more recently in Google Search in the US. These insights have significant implications for competitive assessment, as they reveal that people do not necessarily switch to better alternatives. In short, competition is not "*just one click away*" in reality, contrary to what has long been argued.

The merger assessment should also include a thorough analysis of financial metrics which are usually more reflective of how firms make decisions than outputs of IO analysis, which are often theoretical in nature or rely on data points that are not used in actual company decisions.⁴⁵ The Commission has used financial analysis to assess incentives to foreclose⁴⁶ and the economic viability of divestments⁴⁷, and the UK CMA has been using similar tools. Hence, the Commission should request data points from companies used for actual

⁴² *Since the enactment of the 1989 regulation, the rate of interventions initiated has decreased dramatically, from over 9%, to below 2% in 2023.*" See Brianna Rock, "Merger intervention rates in the EU" <

<https://www.hertie-school.org/en/digital-governance/research/student-working-paper-series/merger-intervention-rates-in-the-eu>>

⁴³ For example see Amelia Fletcher, Zita Vasas, Implications of behavioural economics for the pro-competitive regulation of digital platforms, *Oxford Review of Economic Policy*, Volume 40, Issue 4, Winter 2024, Pages 808–817, <https://doi.org/10.1093/oxrep/grae044>

⁴⁴ See, T-201/04, Microsoft v Commission of the European Communities, para 1034 to 1058; Also see AG Opinion on Google Android (C-738/22) para 139

⁴⁵ A recent study has highlighted the value of applying accounting and financial analysis in competition and merger investigations. See, Vivek Kotecha, "From Industrial Organisation Economics to Financial Analysis" Balanced Economy Project, <https://www.balancedeconomy.org/latest/civilsocietydeclaration-gzh6j-47yjt-y67nn-y56jr-HAvDI-rhkzh-44hc5>

⁴⁶ See Case M.9564 – LSEG/Refinitiv Business

⁴⁷ Case M.9677 - DIC / BASF Colors & Effects

decision-making, such as the profitability of actual profit centres (rather than segments created for assessing the merger). Therefore, the new Guidelines should reflect how firm and consumer behaviour is shaped in digital markets and how a merger can facilitate distortions, ultimately harming consumers.

- ★ The new Guidelines should benefit from behavioral economics and financial analysis complementing with industrial organization analysis.

Inclusion of different market perspectives: The current merger assessment mostly focuses on the effects of a merger on the immediate competitors and suppliers/buyers of the merging parties. This misses the impact mergers have on other market participants, in particular end consumers. We suggest that merging companies should be required to name consumer representatives that are related to their business activities, and that the Commission includes them as relevant parties in their merger assessment and, in particular, in the development of merger remedies. This would strengthen the Commission's ability to assess the potential effects of a merger and ensure that consumer interests are adequately taken into account.

- ★ The new Guidelines should include perspectives from different market participants, specifically consumer organisations, during merger procedures.

3. Acquisition of Nascent Competitors

A key shortcoming of the HMG and NHMG is the limited treatment of acquisitions of nascent competitors. To strengthen the Guidelines, it is essential to better address innovation losses in startup acquisitions. We increasingly observe incumbents consolidating their dominance—often through mergers and acquisitions. Therefore, it is important to *preserve disruption, or at least the possibility that disruption could happen*.⁴⁸ Focusing solely on “killer acquisitions” risks overlooking broader harms. Below, we set out our position on innovation losses in such acquisitions and assess the killer acquisition framework and past cases to underline the need for stronger merger control in digital markets

Innovation losses in startup acquisitions: On one hand, digital markets are defined by dynamic efficiency, rapid innovation, and the constant development of new products and services. On the other hand, they are highly concentrated, dominated by a few Big Tech companies that wield significant influence over how people access information, communicate, shop, adopt new technologies, and even make decisions—including political ones. Because digital markets can enable startups to quickly grow and scale, nascent competitors bear utmost importance in concentrated digital markets.

In digital markets, entry and growth are already challenging due to high barriers to entry. Moreover, quick acquisitions strategies and intimidation practices⁴⁹ by incumbents may deter

⁴⁸ European Commission: Directorate-General for Competition, *Protecting competition in a changing world – Evidence on the evolution of competition in the EU during the past 25 years*, Publications Office of the European Union, 2024, <https://data.europa.eu/doi/10.2763/089949>, pg.87

⁴⁹ Motta, Massimo, and Sandro Shelegia. "The “kill zone”: When a platform copies to eliminate a potential threat." *Journal of Economics & Management Strategy* (2024)

entrants and push them toward peripheral markets, thereby creating so-called 'kill zones'.⁵⁰ Therefore, it is significantly important to protect the independence of startups who managed to gain a foothold in the market. While the target company may not have significant market coverage today, its potential (capabilities) can bring significant competitive benefits. However, if acquired by incumbents, this potential can be eliminated or impaired in order to avoid future competition. Moreover, it can also have adverse effects on the buyer company's innovation efforts.

How to approach startup acquisitions to prevent innovation losses: When analysing acquisitions of a nascent player, we believe the US Merger Guidelines could provide helpful insights on how to approach startup acquisitions. The Commission should consider two criteria: (i) the probability that the nascent player will threaten the acquiring party's economic power (ii) the probability that the entry would generate significant pro-competitive effects. In addition, the level and duration of the market concentration can guide the Commission when calibrating the required probability as the more concentrated the market, the greater the magnitude of harm to competition from any potentially lost entry.⁵¹ Moreover, comparing the target company's current assets with the transaction value can reveal how much future value the buyer expected to generate, thereby helping to identify potential anticompetitive effects.⁵²

Analysing these factors requires a dynamic and forward-looking framework that considers innovation incentives and innovation capabilities of the merging parties. In that sense, the Commission could consider several factors such as:

- Whether the target company has the potential to grow independently
- Whether the buyer would benefit from investing in the acquired technology
- Whether the buyer has the capability to achieve the desired outcome internally

Merger control is a forward-looking exercise, which entails a prediction of events in the future.⁵³ Yet the inherent uncertainty of predicting the future cannot justify a permissive stance toward mergers. A decision as consequential as merger clearance must not rest on speculative or incomplete assessments. Overlooking potential future competitors, or failing to rigorously examine the role of data and its cross-market uses and relying on behavioral remedies risks — in the past has resulted in — flawed clearances with lasting harm to competition and consumers. While avoiding arbitrary decisions, the new guidelines should also allow the Commission sufficient flexibility when assessing the probable effects of the acquisition of nascent players.

Killer acquisitions: As the questionnaire rightly points out, this type of acquisitions pose a significant threat that the Commission must address to safeguard innovation within and beyond Europe. A notable example is the *Illumina/Grail* case, where the Commission applied the killer acquisition theory—arguing that an incumbent sought to acquire a nascent

⁵⁰ Kamepalli, Sai Krishna, Raghuram Rajan, and Luigi Zingales. *Kill zone*. No. w27146. National Bureau of Economic Research, 2020.

⁵¹ US Merger Guidelines 2023, pg.10

⁵² See 'the economic goodwill test', McLean, Andrew P. "A financial capitalism perspective on start-up acquisitions: introducing the economic goodwill test." *Journal of Competition Law & Economics* 17.1 (2021): 141-167.

⁵³ See CK Telecom (Case-376/20), para 85

competitor to suppress its emerging technology. Although the prohibition decision was annulled by the CJEU on jurisdictional grounds, the substance of the case remains highly relevant. Indeed, this troubling trend is further supported by an ex-post analysis from the Commission, which highlights the prevalence of killer acquisitions in EU pharma markets.⁵⁴ The strategy of neutralising potential competitors is also apparent in digital markets. For example, when discussing potential buyout of Instagram, Mark Zuckerberg stated “*Instagram can hurt us*” and identified neutralising a potential competitor as one of the goals.⁵⁵ Indeed, a recent DMW and SOMO research found indications of discontinuation in nearly 67% of Big Tech acquisitions between 2019 and 2025.⁵⁶ The Commission should review the buyer’s past mergers to assess whether those acquisitions killed, neglected, or wasted the potential of nascent players.

The updated Merger Guidelines should elaborate on two criteria when assessing a potential killer acquisition: (i) overlapping products (which should be based on a market definition that considers ecosystem dynamics) and (ii) intent to discontinue (which should not be required). First, the Commission shouldn’t analyse the overlap between the acquirer and target’s technology with a narrow market definition. The characteristic of digital markets already entails high entry barriers for potential competitors to enter and grow in the market. As the US Merger Guidelines point out: “*The most likely successful threats in these situations [where factors such as network effects, scale economies or switching costs make it extremely difficult for a new entrant to compete] can be firms that initially avoid directly entering the dominant firm’s market, instead specializing in (a) serving a narrow customer segment, (b) offering services that only partially overlap with those of incumbent, or (c) serving an overlapping customer segment with distinct products of services.*”⁵⁷ Therefore, today’s complementary technology may lead to a shift in consumption and pose a competitive threat to incumbents, even when they are not in the same market. Second, the Commission shouldn’t seek an “intent” when it analyses a possible killer acquisition. Such a requirement would make it practically impossible to apply the killer acquisition theory. Rather, the assessment should consider whether the acquiring firm has the capability and incentive to further develop the acquired technology in a way that allows society to reap its benefits fully. Lastly, it is also important to note that killer acquisition theory shouldn’t require a discontinuation. Buyers can also limit the potential of the target technology by depriving them of necessary resources — a practice the Instagram co-founder alleged Facebook did following its acquisition of Instagram and Google resorted to after buying Fitbit.⁵⁸

⁵⁴ European Commission: Directorate-General for Competition and Lear, *Ex-post evaluation, EU competition enforcement and acquisitions of innovative competitors in the pharma sector leading to the discontinuation of overlapping drug research and development projects – Final report and appendices*, Publications Office of the European Union, 2024,

⁵⁵ <https://www.theverge.com/2020/7/29/21345723/facebook-instagram-documents-emails-mark-zuckerberg-kevin-systrom-hearing>

⁵⁶ <https://www.somo.nl/big-tech-acquires-a-new-company-every-11-days/>

⁵⁷ US Merger Guidelines pg.20 clarification added

⁵⁸ <https://fortune.com/article/mark-zuckerberg-meta-instagram-growth-threat-facebook-instagram-cofounder/> and <https://www.heise.de/en/news/Google-discontinues-Fitbit-s-web-dashboard-reduces-fitness-tracker-to-the-app-9760911.html>

Potential risks of acquisitions of nascent players are not limited to the killer acquisition theory. Killer acquisitions represent only a small subset of anticompetitive deals aimed at preventing future competition. In some cases, such mergers may lead to innovation losses even without eliminating the target technology. Specifically, when the acquired technology poses a threat to the incumbent's digital ecosystem, the acquirer may be both incentivised and able to steer the direction and quality of innovation in such a way that it no longer endangers its own ecosystem. Therefore, the new guidelines should address such cases to ensure society can benefit fully from the potential of nascent technologies.

- ★ The new Guidelines should explain how it will preserve an environment where small yet innovative startups can challenge established companies.

Case Examples: We believe it is very important to learn from the past mistakes and success by reviewing the track record of digital merger control in the EU. We find the recent publications by the Commission on ex-post assessment of competition policy particularly important and helpful, and encourage the Commission to analyse and share its findings related to the aftermath of mergers.⁵⁹ While most of the consequential (also in an anticompetitive way) tech mergers went under the radar, some of the notable ones were caught by the EUMR and investigated by the Commission.

Therefore, we present our observations on some recent digital mergers — most of which suffered from weak enforcement of EU merger control laws, though in a few instances the Commission's actions led to better outcomes for society also elaborated below.

- **Facebook/WhatsApp:** In 2014, the Commission approved Facebook's acquisition of WhatsApp without a Phase II investigation and without any remedies.⁶⁰ One of the concerns that the Commission analysed was the possible integration between Facebook and Whatsapp. Although some third parties expressed concerns,⁶¹ the Commission concluded that such an integration would not be technically straightforward and could cause users to switch to competing services.⁶² Unfortunately, the decision did not sufficiently account for the significance of data in digital markets or the implications of Facebook acquiring control over the data of WhatsApp's 600 million users at the time, in addition to Facebook's own 1.3 billion users.⁶³ Three years later, the Commission fined Facebook €110 million for misleading the Commission regarding account matchmaking between Facebook and WhatsApp.⁶⁴ In 2019, Bundeskartellamt prohibited Meta from combining user data from different sources without the users' consent. Later, the CJEU also confirmed that a competition authority can consider data protection rules when conducting an abuse of dominance case.⁶⁵ Further, the Digital Markets Act imposed strict obligations for gatekeepers regarding combining data

⁵⁹ See https://competition-policy.ec.europa.eu/publications/ex-post-economic-evaluations_en

⁶⁰ Case No COMP/M.7217 - FACEBOOK/ WHATSAPP

⁶¹ Facebook/Whatsapp para 137

⁶² See Facebook/Whatsapp decision paras 136-140 and 159-162

⁶³ Facebook/Whatsapp para 84 and 143

⁶⁴ European Commission Announcement - Mergers: Commission fines Facebook €110 million for providing misleading information about WhatsApp takeover,

https://ec.europa.eu/commission/presscorner/detail/en/ip_17_1369

⁶⁵ Case C-252/21, *Meta v Bundeskartellamt*

across different services. Today, both WhatsApp⁶⁶ and Facebook⁶⁷ *each* has 3 billion monthly active users. Moreover, Meta was designated as gatekeeper for five different core platform services, three of which (Facebook, Messenger, and WhatsApp) were analysed in this specific merger. Maybe more importantly, there are only two number-independent interpersonal communications services covered by the DMA and both of them are owned and controlled by Facebook (Meta). In summary, the Facebook/WhatsApp merger led to at least one Commission infringement decision, a ruling by the CJEU, and the adoption of an entirely new law—consequences that might have been avoided or mitigated had the merger been prohibited.

- **Microsoft/Skype:** Skype, developed by European innovators, was one of the most influential communication technologies of the early 2010s. By the fourth quarter of 2010, it had amassed an impressive 145 million monthly connected users.⁶⁸ In 2011, Microsoft acquired Skype for \$8.5 billion, gaining access to its rapidly growing base of 170 million users.⁶⁹ Although the Commission investigated the Microsoft/Skype merger, it found no anti-competitive risks and hence approved the merger without any remedies and without a detailed Phase II investigation.⁷⁰ While Microsoft released Microsoft Teams in 2017, Skype reached 300 million active users in 2019.⁷¹ However, Skype gradually lost its popularity after the acquisition despite the growing market for video calls. Eventually, Microsoft Teams's rise became Skype's demise. Microsoft didn't find it profitable to invest and develop two competing products and Skype was upstaged.⁷² Unavoidably, this negligence accelerated the downfall of Skype. Earlier this year, Microsoft announced it would discontinue Skype in May 2025 and encouraged users to transition to Microsoft Teams.⁷³ In essence, Microsoft bought a technology it could have built in-house, and when it eventually did develop that technology itself, it allowed Skype to wither away.
- **Google/Fitbit:** In 2019, Google announced its intention to acquire Fitbit, a leading manufacturer of fitness trackers and wearables, for approximately \$2.1 billion.⁷⁴ The Commission approved the merger in December 2020 after a Phase II investigation, subject to a set of commitments. These included obligations related to data separation, access to Fitbit's Web API for third parties, and a commitment not to use health and wellness data from EEA users for Google Ads for ten years.⁷⁵ However, the core issue was the combination of Fitbit's sensitive health data with Google's vast ecosystem of services and its dominance in

⁶⁶ TechCrunch, *WhatsApp now has more than 3 billion users a month*, <https://techcrunch.com/2025/05/01/whatsapp-now-has-more-than-3-billion-users/>

⁶⁷ TechCrunch, "Facebook surpasses 3 billion monthly active users"

<https://techcrunch.com/2023/07/26/facebook-3-billion-users/>

⁶⁸ <https://www.sec.gov/Archives/edgar/data/1498209/000119312511096544/ds1a.htm>

⁶⁹ <https://news.microsoft.com/source/2011/05/10/microsoft-to-acquire-skype-3/>

⁷⁰ European Commission Press Release, Mergers: Commission approves acquisition of Skype by Microsoft, Case M.6281

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<https://azure.microsoft.com/en-us/blog/how-skype-modernized-its-backend-infrastructure-using-azure-cosmos-db-part-1/>

⁷² <https://www.cnn.com/2020/10/10/skype-upstaged-by-microsoft-teams.html>

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<https://support.microsoft.com/en-us/skype/skype-is-retiring-in-may-2025-what-you-need-to-know-2a7d2501-427f-485e-8be0-2068a9f90472>

⁷⁴ <https://blog.google/products/platforms-devices/agreement-with-fitbit>

⁷⁵ https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2484

digital advertising and data analytics. As interested third persons argued, the commitments were difficult to monitor and enforce, and the structural implications of the merger—particularly the potential for Google to entrench its dominance through data aggregation and ecosystem expansion—were not adequately addressed.⁷⁶ Since the acquisition, Google has increasingly integrated Fitbit into its broader hardware and software ecosystem, and from February 2, 2026, Fitbit accounts will require Google logins.⁷⁷ These developments suggest a gradual phasing out of Fitbit as an independent brand and a deeper integration into Google's ecosystem, raising questions about the long-term effectiveness of the Commission's remedies. In addition, the Commission's review did not identify any concerns with regard to the digital healthcare sector or health related markets, in general, "because the digital healthcare sector is still nascent in Europe with many players active in this space".⁷⁸ Health related markets ought to have also been part of the Commission's review. They stand, at present, the chance of being the markets which miss out on regulatory scrutiny and which Google is allowed to dominate, with various disadvantageous consequences in years to come.⁷⁹ The Google/Fitbit case illustrates the limitations of behavioural remedies in digital mergers, especially when dealing with data-driven conglomerates. It also highlights the need for a more precautionary approach in assessing ecosystem effects, data consolidation, and the potential for long-term entrenchment of market power. A more robust application of ecosystem theories of harm and a stronger emphasis on structural remedies—or even prohibition—might have better safeguarded competition and consumer welfare in this case.

- **Microsoft/Activision Blizzard:** With a \$68.7 billion price tag,⁸⁰ the Activision Blizzard acquisition ranks among the largest mergers and acquisitions in history—unsurprisingly attracting intense regulatory scrutiny, including a temporary block in the UK and conditional approval by the Commission⁸¹. While it may still be early to fully assess its long-term impact, several adverse consequences have already emerged. Following the deal, Microsoft laid off thousands of employees,⁸² predominantly in its gaming division;⁸³ cancelled multiple development projects;⁸⁴ and shut down several game studios, including high-profile ones.⁸⁵ Microsoft also restructured its Xbox Game subscription tiers, restricting access to certain titles under specific plans,⁸⁶ and raised the price of Xbox Game Pass⁸⁷ and Xbox consoles.⁸⁸

⁷⁶ <https://privacyinternational.org/legal-action/european-commissions-review-googlefitbit-merger>

⁷⁷ <https://support.google.com/fitbit/answer/14237024?hl=en>

⁷⁸ https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2484

⁷⁹ <https://cepr.org/voxeu/columns/googlefitbit-will-monetise-health-data-and-harm-consumers>

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<https://news.microsoft.com/source/2022/01/18/microsoft-to-acquire-activision-blizzard-to-bring-the-joy-and-community-of-gaming-to-everyone-across-every-device/>

⁸¹ European Commission Press Release, Mergers: Commission clears acquisition of Activision Blizzard by Microsoft, subject to conditions, Case M.10646

⁸² <https://www.theverge.com/news/693535/microsoft-layoffs-july-2025-xbox>

⁸³ <https://www.eurogamer.net/microsoft-to-lay-off-1900-people-across-xbox-and-activision-blizzard>

⁸⁴ <https://insider-gaming.com/bethesda-cancels-funding-multiple-projects-studios/>

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<https://www.eurogamer.net/arkane-lyon-boss-leads-widespread-condemnation-of-bethesda-closures>

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<https://www.eurogamer.net/xboxs-new-game-pass-standard-tier-yanks-access-to-starfield-hellblade-2-diablo-4-and-more>

⁸⁷ <https://www.bbc.com/news/articles/czk0dzkijn7o>

⁸⁸ <https://support.xbox.com/en-US/help/hardware-network/console/may-2025-pricing-updates>

Although the company initially announced a general price hike also for its games, it reversed course after significant customer backlash.⁸⁹

Effective enforcement in digital markets:

- **Adobe/Figma:** While direct challenges to digital mergers have been rare, the Commission has achieved a few success stories when it interfered and blocked a merger. Undoubtedly, the Adobe/Figma case is the most relevant and telling example. In 2023, the Commission opened a merger investigation into Adobe's proposed acquisition of Figma thanks to referral requests from member states. In November 2023, the Commission sent a Statement of Objection outlining the potential anticompetitive effects of the merger.⁹⁰ These include elimination of internal product development (reverse killer acquisition) and elimination of potential competition. Further, in a Merger Brief (Issue 2/2024), the Commission states that one of the main competitive restraints to digital ecosystems is the *emergence of nascent competitors active not at the core but rather at the boundaries of the ecosystem*.⁹¹ Consequently, the competitive potential of Figma created the basis of Commission objections to the deal although there was no final decision as the parties abandoned the deal. After Adobe abandoned the deal, Figma has continued to expand, innovate, and scale. The company has since launched Figma AI (prompt-to-code), Figma Slides (presentations), Figma Sites (website hosting), and Figma Buzz (brand asset management), and Figma Draw which serves as a direct competitor to Adobe Illustrator.⁹² Moreover, Figma recently completed a highly successful IPO.⁹³
- **Other examples:** Although Figma's innovativeness can be attributed specifically to the Commission efforts, there are other examples showing why preserving the independence of innovative companies is very important. In 2020, Visa's attempt to buy Plaid faced regulatory scrutiny and eventually Visa abandoned the deal. After the attempt, Plaid continued to grow⁹⁴ reached \$6.1bn valuation and is expected to go to IPO soon.⁹⁵ In 2021, the US FTC sued NVIDIA's \$40 billion acquisition of chip design firm Arm which resulted in termination of the deal in 2022. Since then, Arm has grown substantially⁹⁶ reaching a valuation of more than \$100 billion.

- ★ The Commission should increase the work related to ex-post evaluation of merger policy and monitor the outcomes of previous mergers.

⁸⁹ <https://hypebeast.com/2025/7/microsoft-xbox-rolls-back-price-following-fan-pushback>

⁹⁰ https://ec.europa.eu/commission/presscorner/detail/en/ip_23_5778

⁹¹ Merger Brief (Issue 2/2024), pg.3

⁹² <https://economicpopulist.substack.com/p/its-not-just-figma>

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<https://www.wsj.com/articles/figma-is-largest-vc-backed-american-tech-company-ipo-in-years-a143c9c5>

⁹⁴

<https://techcrunch.com/2024/06/29/as-plaid-matures-the-fintech-giant-says-enterprise-growth-is-starting-to-outpace-the-rest-of-its-business/>

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<https://techcrunch.com/2025/04/03/fintech-plaid-raises-575m-at-6-1b-valuation-says-it-will-not-go-public-in-2025/>

⁹⁶

<https://www.reuters.com/business/media-telecom/arm-estimates-14-fold-increase-data-center-customers-since-2021-company-says-2025-07-09/>

Conclusion

Digital Merger Watch believes that vigorous merger enforcement is essential to safeguard digital markets in the European Union, ensuring that resources are not overly concentrated and remain at the service of all citizens. It is therefore crucial to revise the Guidelines to reflect the new economic and political realities, particularly those shaped by digitalisation. A permissive approach does not only harm people as consumers — it also harms them as citizens, by increasing dependence on a few companies, expanding data collection, limiting diversity and pluralism, and ultimately undermining fundamental rights, freedoms, and democracy. Repeating past mistakes will not deliver benefits for EU citizens — just as it did not before. We therefore urge the adoption of the following recommendations to update, strengthen, and modernise the Guidelines for the digital age.

- Enable the use of ecosystem theories of harm which considers the interrelatedness and interconnectedness between different products and services
- Put a greater emphasis on non-price aspects of competition
- When assessing competition, use broader indicators such as markups, diversity, choice, and pluralism, rather than relying primarily on narrow measures like the HHI
- Prioritise vigorous enforcement over a wait-and-see approach in markets prone to tipping and leveraging practices
- Scale and innovation claims should be rejected when they justify further concentration or entrench the market power of dominant firms
- Consider not only the probability but also the potential magnitude of harm—a balance of harm approach
- Adopt reversal of burden of proof targeting acquisitions by dominant companies and acquisitions in concentrated markets
- Consider the impact of digital mergers on labour markets
- Benefit from behavioral economics and financial analysis complementing with industrial organization analysis
- Include perspectives from different market participants, specifically consumer organisations, during merger procedures
- Explain how new guidelines will enable small yet innovative companies to challenge incumbents
- Increase the work related to ex-post evaluation of merger policy and monitor the outcomes of previous mergers

Digital Merger Watch

Signatory Organisations

