ADAPTING THE EU MERGER CONTROL POLICIES IN THE DIGITAL AND TECH MARKETS: A CALL FOR A DIFFERENT APPROACH TO MERGER ASSESSMENTS

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Abstract: *This article explores the rapidly evolving digital and tech markets and the challenges they pose in the context of merger review. It underscores the need for greater audacity and more flexibility by the European Commission and national competition authorities when examining mergers. Disrupting traditional paradigms with an open mind is crucial to move forward. Proper emphasis to the efficiency defence and the innovation defence should be paramount to ensure appropriate application of the EU merger control policy. It also explains why opting for structural remedies as a rule might just not be the most suitable solution when commitments are required to clear mergers in the digital and tech environments. Finally, concrete proposals are shared to help policy makers implement the new EU merger control policies in the digital and tech markets.*

Keywords: Dynamic Markets; Digital Platforms; Tech Industry; Mergers; EC and NCAs; Article 22 EUMR; Competition Policy; Draghi Report; Efficiency and Innovation Defence; Consumer Welfare.

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1. INTRODUCTION

Over the past quarter of a century, there has been a monumental change in the global market, especially in how trade is conducted. A significant number of commercial transactions today have different form and are carried on through new supply channels.

Around the world, digital platforms have been able to bring buyers and sellers closer. These undeniable changes are not limited to technology companies, although the changes brought by these types of companies are obvious.

Digital companies have undoubtedly shown the dynamic potential of commercial relationships while digital platforms are designed to facilitate consumer experience. However, the disruption in the traditional commercial paradigm led to these companies achieving considerable market power in a relatively short period of time.

Even in traditional sectors like hospitality, dining, and transportation, businesses are adapting to the digital transition. Many of these establishments now coexist with solely digital business models, offering new services to consumers. For instance, hotels are competing with Airbnb by providing more personalized services, diverse offerings, and loyalty programs to their clientele. Similarly, restaurants are partnering with companies like Uber Eats, thereby increasing their customer base without being constrained by the physical space of available tables. Traditional taxi services are also competing with Uber and similar platforms through their own apps.

Furthermore, before Uber came on the scene, commercial passenger transportation in private vehicles was significantly less common in the Western world[1]. Before *cryptocurrency*, it would have been inconceivable to use an unregulated private currency on large scale all around the world to settle debts. These activities were highly regulated by Member States and there was not much room to *think outside the box*.

These revolutions have created enormous benefits for consumers, benefits that have called current government regulations into question and even obliged Member States to review their legislation. However, the speed at which these companies have grown, became successful, and gained power has led to the European Commission ("EC") and the Member States voicing concerns about their actions.

1 There were other solutions such as limousines with chauffeurs and companies offering private transport services focused on the business and tourism markets. However, the popularization of private transportation competing with taxis likely emerged with applications such as Uber.

In today's world, there is a perception that large digital companies, with a higher net worth than the GDP of many countries, have commenced a never-ending process of mergers and acquisitions with a resulting growth in power that may evade government control[2]. GAFAM[3], for example, have jointly acquired more than 900 companies since their foundation[4].

Concern is growing among the Member States, the EC and certain fringes of civil society. Member States and the European Union ("EU") feel the need to act decisively and quickly as they believe that this process must be slowed down. The most widespread justification for this is related to the belief that these large digital and technology companies have grown too quickly, gained too much power, and exploit their dominance through toxic behaviours that hinder free competition in the market and diminish consumer welfare in general[5]. This perception is sometimes aggravated by the occasional apparent proximity between political power and large tech and digital companies[6]. This closeness may raise eyebrows and can even create mistrust regarding fair and impartial treatment. These giants are rarely treated like the average individual or small and medium size companies, and this disparity has sparked much criticism[7]. However, it's worth noting that such close relation-

2 *See* Crémer et al., 2019: p. 115.

3 An acronym that comprises the five biggest digital and tech companies.

4 *See* Gugler et al., 2023: p. 2.

5 *See* Wu (2018: p. 58) when analysing the political antitrust environment in the US, states the following: *"[t]he simplest – if slightly overstated – way to put this is as follows. The more concentrated the industry, the more corrupted we can expect the political process to be. Here, by corrupted, we mean a political system that does not serve its stated goals – service of the public's interests – but instead favors a few groups at the expense of the general public. All of this amounts to just a more fancy way of demonstrating Roosevelt's point: Concentrated private power can serve as a threat to the Constitutional design, and the enforcement of the antitrust law can provide a final check on private power. This, by itself, provides an independent rationale for enforcement of the antitrust laws."*

6 For instance, with the current administration of Donald Trump in the US, these ties have become deliberately public and undeniable. Some of these digital and tech giants helped Donald Trump being elected by contributing with significant donations, openly given financial support to the presidential-inauguration fund and now receive favourable treatment when compared to most American businesses.

7 *See* Wu (*supra* n. 5: pp. 55, 58 and 71) focusing on the US context. However, the strong lobbying of big tech and digital companies is also felt in the EU as reported, for example, in https://www.nytimes.com/2020/12/14/technology/big-tech-lobbying-europe.html. Notwithstanding, in the EU these companies are facing a much more hostile environment when compared to what they encounter in the US: https://www.nytimes.com/2022/03/24/technology/eu-regulation-apple-meta-google.html and https://www.ft.com/content/2f15b832-5cb8-11e7-b553-e2df1b0c3220. Sometimes, there are also doubts about whether the disciplinary actions against these big tech and digital companies and the stringent regulatory measures imposed in Europe serve the purpose of an international trade war. This is particularly relevant considering

ship between political power and large corporations have always existed. And in most countries, there exists appropriate legislation designed to address and penalize unacceptable behaviours in relation to such proximity.

But does this favouritism undermine the impartiality and fairness of democratic states in applying competition law? That remains a critical question.

Additionally, it is not always clear how these conducts negatively impact the competitive process, or how they affect consumer welfare. This does not mean that these situations do not occur, and when they do, they may generate a negative perception in the society and even harm fair and free trade. But we believe such statements require at least: (i) a justification based on specific facts, (ii) indisputable theories of harm, and (iii) an explanation of how the facts fall within competition law as opposed to another area of law (or even within the field of immorality).

When addressing such issues, it is essential to establish a clear boundary between a neutral approach grounded in the science of law versus a biased approach without a solid substantial legal foundation.

It is important to highlight that large corporations also bring its benefits since economic power may generate employment, which in turn can enhance the standard of living of the society. Significant economic power boosts tax revenue in numerous countries and these resources can also contribute to the increase of social well-being. Furthermore, hosting the headquarters and manufacturing facilities of a company like Google, Amazon, Facebook, Apple, Microsoft or similar tech giants generates employment and adds a prestigious stamp to a nation's reputation. Consequently, countries have long competed to attract these companies within their borders.

Under this context, competition authorities have a duty to act with extreme care and not be driven by inflammatory and unfounded rhetoric. If competition authorities do not exercise due diligence when assessing competition law matters, their credibility may be compromised. This could lead to concerns about the potential misuse of power by these authorities to pursue governmental political agendas.

Against the above-mentioned background and considering the rapid development of the digital and tech world, a perception emerged that EU competition law has been grappling with inadequacies in effectively and promptly addressing anticompetitive conduct by large digital and tech

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the scarcity of European enterprises equipped to rival these digital and tech behemoths: https://www.economist.com/business/2024/12/05/will-europe-ease-up-on-big-tech corporations. This phenomenon is especially true in the context of merger control[8]. New approaches have therefore been adopted in competition law due to the widespread idea that the digital and tech world moves very quickly and that competition authorities had neither the resources nor the means to intervene quickly and efficiently[9].

Despite the considerable progress of the EU merger control over the last decades, its underlying analytical framework remains predominantly static, ill-suited to the fast and innovation-driven nature of digital and tech markets. The current system, focused on traditional market-share thresholds and price effects, often fails to capture the dynamic harms produced by successive acquisitions of nascent competitors, data-driven ecosystems leverage, and network effects. As a result, dominant platforms may legally consolidate their market power under the guise of efficiency, while competition authorities remain constrained by outdated tools and evidentiary standards. On the opposite side, competition authorities also may be tempted to give no leeway whatsoever to such risks posed by digital and tech companies, and when faced with mergers in the digital and tech world, adopt an overly radical stance of prohibition or even impose remedies that are entirely disproportionate to the risks that such mergers may generate.

Evidence of this regulatory lag can be seen in the series of high-profile acquisitions by large tech companies – many of which escaped scrutiny under the existing Regulation 139/2004 ("EUMR") thresholds – and EC's own recognition, in its 2021 and 2024 policy communications, that these instruments no longer capture the economic significance of innovation-driven transactions. Reports such as the Competition Policy for Digital Era (Crémer et al., 2019) and the Draghi Report (2024) confirm that merger assessments rooted in static market definitions risk under-enforcing competition law in fast-moving digital ecosystems. There are also numerous more recent examples, especially in Europe and the USA, where the scrutiny of mergers in the digital and tech sectors has run up against debates over excessive prohibitions and disproportionate structural remedies.

The mismatch between static legal instruments and dynamic market realities constitutes the central problem that this paper seeks to address. In this context, we also propose to evaluate the direction in which EU merger control is moving and perhaps should be moving, and propose solutions as

8 *See* Kerber, 2018: p. 33.

9 *See* OECD, 2023a: p. 6.

regards the implementation of remedies in merger control proceedings in the digital and tech environment.

2. THE ACTIONS ADOPTED BY COMPETITION AUTHORITIES

Taking the above into consideration, there is a growing sense that merger control is not as stringent as it should be and that it has been unduly accepted that mergers in general tend to be beneficial, increase market efficiency, and involve advantages for consumers[10]. For those who support this view, there are far too many mergers that have skipped review, clearance decisions that should have been prohibited or at least subject to greater scrutiny. In addition, competition law and economics still rely too many times on a static concept of competition that has significantly influenced the assessments of mergers. It is necessary to develop new concepts for dealing with innovation competition on the theoretical level of competition economics, as well as, on the level of assessment concepts for analysing innovation and innovation competition in merger cases[11].

Given this context, the EC and the different Member States feel that there is a need for action.

But to address this issue, it is essential to begin with an impartial analysis, accepting certain premises that time has shown to be well-founded. And in this context, as Pablo Ibáñez Colomo rightly asserts that horizontal mergers tend to reduce, even if in a modest way, the competitive pressure by eliminating a source of competition. Given that firms generally have some market power, any decline in competition enhances the market power of the merging parties. Thus, such transactions may impede effective competition as defined

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10 *See* the 2021 joint statement of the CMA, ACCC and Bundeskartellamt https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Stellungnahmen_Opinion/Joint_Statement_CMA_ACC_Bundeskartellamt.pdf?__blob=publicationFile&v=3. These concerns are also evident from the Questionnaire by the European Parliament to the Commissioner-Designated Teresa Ribera before being confirmed as Executive Vice-President, whereby the following questions were raised: "*Are you satisfied with the current state of play of the application of the Merger Regulation? Would you be in favour of Commission's possibilities to also look into mergers below the notification threshold? How will you protect our EU innovators from killer acquisitions or acquisitions of EU based undertakings by foreign-based state-owned enterprises supported and subsidised by their governments in ways that the EU single market rules prohibit for EU entities?*": ribera_writtenquestionsandanswers_en.pdf

11 *See* Kerber, *supra* n. 8: p. 34.

in Article 2 of EUMR. This would be especially the case in the context of "gap cases"[12].

Furthermore, as well established in the EU merger control, the substantive test enshrined under the EUMR focus on whether the merger would "significantly impede effective competition"[13]. Therefore, Article 2 of the EUMR requires that the impediment to effective competition be "significant" for the EU to justify intervention[14]. As the above-mentioned author points out, the boundaries between significant and insignificant impediments to effective competition may be blurred, and drawing the line between these two realities can prove to be a complicated task.

The challenge in merger control is determining the tipping point at which the creation or enhancement of market power becomes significant enough to cause unacceptable effects from a competition law point of view. Moreover, in the merger control context there is no robust set of decision precedents defining the notion of "significant impediment to effective competition". In fact, the CK Telecoms case was the first in which the EU courts were presented with the opportunity to engage with this mission[15].

Horizontal and non-horizontal merger guidelines offer proxies to help on the analysis to identify factors that might be relevant in evaluating a specific situation but there is a long way for case-handlers to adjust such proxies to the particularities of each case. Moreover, the guidelines for horizontal and non-horizontal mergers were not originally designed to address the unique challenges posed by digital markets.

Considering the challenges in applying these concepts and proxies within the context of the digital market, there is frequent discussion of new approaches when assessing mergers[16], as for example, conducting an *ex-post*

12 *See* Colomo, 2021, pp. 348 and 352.

13 As opposed to the former test established under the previous Regulation 4064/89 that aimed to assess if the concentration would create or strengthen a dominant position.

14 *See* Colomo, *supra* n. 12: p. 348.

15 *Ibid.*, p.353. *See* also Monti (2024: p. 5) where the author stresses that it would be acceptable to present less evidence in a merger where the dominant player mergers with the only other rival, where entre barriers are clearly high, and there is no countervailing buying power. Conversely, more granular analysis of the markets and a higher duty to provide reasons are required in other situations. It is up to the EC and NCAs to present a sufficiently cogent and consistent body of evidence to demonstrate that it is more likely than not that the concentration concerned would significantly impede effective competition. Hence, the standard of proof does not change according to the type of merger, but the quality and quantity of evidence required to reason the decision is greater the more complex the case is.

16 *See* Lear, 2019: indent I.149 p. 44 and indent I.159 p. 46. *See* also Modrall, 2024.

analysis of mergers that have already been implemented (even outside the context of an abuse of a dominant position), and sometimes even in cases where the merger was not subject to the merger control thresholds[17], or has been reviewed and cleared by competition authorities. Additionally, there is talk about breaking up companies that grow so large they might stifle market competition[18], along with calls for stricter and more effective merger controls[19]. There are also proposals advocating for the incorporation of new concepts such as "dynamic competition" and "innovation defence" in merger assessments.

In any of the scenarios, it is imperative to always assume that any intervention must be based on legitimately approved regulations that respects the fundamental principles of the rule of law.

Moreover, when applicable, we will have to analyse the remedies in the current legal framework also in the light of the principles of the rule of law.

In any case, it is also paramount to recognize that, within the principles of a democratic rule of law, the legislative powers in the EU and Member States possess the necessary competence to devise the most suitable solutions for addressing the identified problems and deficiencies detected within the realm of competition law.

The notion that parliaments and/or the EC should be constrained and avoid altering the *status quo* is misleading and inadequate considering the democratic concepts of the society, and in particular considering the dynamics of digital markets.

2.1. The strengthening of the EU merger control policy

In 2016, the EC conducted an evaluation of the procedural and jurisdictional aspects of European merger control[20]. This exercise led to the conclusion that some transactions involving companies with low turnover, but highly competitive potential in the internal market were not being reviewed by either the EC or the Member States. Hence, a call for a more frequent use of the existing tools of referrals under Article 22 was launch by Margrethe Vestager,

17 As occurred with the Illumina/Grail case.

18 *See* Khan, 2019. Lina Khan passionately advocated for the revaluation of structural remedies in the context of merger control, frequently suggesting the application of the essential facilities doctrine to big tech companies functioning as gatekeepers. On the separation of Facebook-Instagram and Facebook-WhatsApp, *see* Wu, *supra* n. 5: pp. 132-133.

19 *See* the joint statement, *supra* n. 10: §§1, 15-18.

20 *See* European Commission, 2021a.

to capture mergers which would significantly impact competition in the internal market[21]. A that stage, the then Executive Vice-President Margrethe Vestager also conveyed the possible revision of certain procedural aspects of EU merger control[22].

An increase of mergers involving companies that were or could have become significant competitors exerting therefore mutual competitive pressure were identified, despite one of them generating low or no turnover at the moment of the concentration. As a result, certain mergers that could potentially impact competition within the internal market have not been reviewed neither by the EC nor Member State. And this was particularly true for mergers involving emerging competitors and innovative companies, and where the incumbents would have an incentive to discontinue the activity of the acquired company ("killer acquisitions")[23].

Considering the aforementioned aspects, in her speech at the 24th IBA annual conference, the former Executive Vice-President Margrethe Vestager acknowledged that there was a need to adjust the regulations on mergers in order to address, and adapt them to, the changes in the economy. It would be necessary to identify mergers that could cause serious damage to effective competition but which, even so, did not reach the thresholds that require notification to the competent competition authorities. A new focus concerning the rules on mergers was therefore revealed in relation to the issue of referrals[24].

On 31 Mar. 2021, the EC approved new Guidelines on the application of the referral mechanism established under Article 22 of the EUMR[25]. In these Guidelines, the EC stated that the wording of Article 22, the legislative background and its purpose, clearly showed that Article 22 EUMR applied

21 *See* European Commission, 2021b.

22 *Ibid*.

23 *See* Cunningham, 2021: especially pp. 1-2, 4, 18, 29, 39-44. It is a seminal work in the field of drug development, but the main conclusions can be extrapolated to the digital and tech environment. The authors concluded that incumbent firms may acquire companies with the sole purpose to discontinue their activities. This would be particularly true in the case of an overlap between product portfolios of the acquiring company and the acquired company. *See* also Cassiman (2003: pp. 22 and 24) where they concluded that mergers of companies with overlapping technological knowledge ("technology relatedness") tended to decrease R&D efforts by eliminating common inputs to the R&D process and terminating duplicate projects. Conversely, mergers of companies with complementary technology capabilities tended to develop R&D, as well as new knowledge by combining their capabilities.

24 *See* European Commission, 2020.

25 *See* European Commission, 2021c.

to all mergers and not only those that complied with the respective jurisdictional criteria of the referring Member State[26]. In the EC's opinion, the practice over the years had been to discourage referrals of mergers that did not reach the thresholds of Member States, due to the idea that they were unlikely to have a significant effect on the internal market[27]. However, the EC believed that this context had changed, and the paradigm ought to be adapted to this interpretation of Article 22 of the EUMR.

Consequently, the EC intended to encourage and accept certain referrals in cases in which the referring Member State did not initially have jurisdiction over the matter, provided that the following legal requirements were met: the merger had to (i) affect trade between Member States, and (ii) threaten to significantly affect competition in the territory of the referring Member State or States[28].

This solution was not immune from criticism, particularly when it provided for a review of mergers: (i) concluded less than 6 months ago[29], and (ii) notified in one or more Member States, but these had not requested or joined a request for referral[30]. Questions arose as to whether the solution would be able to increase transparency, predictability and legal certainty under Article 22 of the EUMR, as claimed by the EC in its Guidelines[31]. It was quite evident that the exact opposite might just occur.

In addition to the position taken by the EC, the Competition & Markets Authority ("CMA"), the Australian Competition & Consumer Commission ("ACCC") and the Bundeskartellamt issued a joint statement on 20 Apr. 2021 on the need for strict and effective application of the regulations governing mergers[32]. In particular, according to the parties making the statement, the call for strict and effective application was justified by the increasing number of merger reviews in dynamic markets that change quickly[33]. This statement claimed that in the context of complex and dynamic markets and in light of

26 *Ibid.*: §6.

27 *Ibid.*: §8.

28 *Ibid.*: §13.

29 *Ibid.*: §21.

30 *Ibid.*: §22.

31 *Ibid.*: §12.

32 The statement implicitly indicates that, at least in certain situations, the current merger control system does not function as it should.

33 *See* the joint statement, *supra* n. 10: §§1-2.

the need to make forward-looking value judgments, the competition authorities should grant preference to structural rather than behavioural remedies[34].

Yet, as we will see below, for us at least, it was not, and it is not entirely clear whether a direct link exists between structural remedies and a strict and effective application of merger review.

2.2. The ECJ's position on the strengthening of the merger control policy: the stance adopted regarding the Illumina /Grail judgment

The ECJ recently scrutinized the Commission's interpretation of Article 22 of the EUMR, through joined cases C-611/22 P and C-625/22 P, ultimately rejecting this interpretation and overturning the General Court's supportive ruling.

Notwithstanding the detailed exploration of the literal, historical, contextual, and teleological interpretations of the EUMR, particularly Article 22, and the analysis of recitals 6 and 7, 11, 14, 15, and 24, as well as the examination of the Dutch clause and the one-stop-shop principles, the ECJ's focus on legal certainty and predictability was paramount. For this purpose, the ECJ asserted that the EC's interpretation, once endorsed by the General Court, compromised the efficacy, predictability, and legal certainty crucial for parties in the merger context.

The ECJ correctly emphasized that the criteria prompting notification obligations for merger are vital for ensuring predictability and legal certainty for the involved companies, deeming the EC's position a violation of these core principles[35].

Additionally, the ECJ also affirmed that Member States retain the freedom to review and adapt the criteria within their legal frameworks to address mergers that bypass existing legislation[36].

With this ruling, it became clear that there were strong reasons for the surprise about the EC's creative interpretation of its powers to analyse mergers.

The message conveyed by the ECJ was highly pertinent, also demonstrating that the EU's system of checks and balances is fully effective. It became evident that the EC is also bound by the rule of law, and that there are inalienable values that cannot be compromised. It also showed the path by

34 *Ibid.*: §16.

35 Joined cases C-611/22 P and C-625/22 P, *Ilumina Inc. and Grail LLC v. European Commission,* 3 September 2024, ECLI:EU:C:2024:677: §§206, 209-210.

36 *Ibid.*: §217.

clearly stating that Member States have the right and the powers to amend the legal framework.

Nevertheless, the Illumina/Grail has not prevented the EC from scrutinizing mergers that fall below the EUMR thresholds but meet the notification criteria of one or more Member States. That has happened in the Adobe/Figma case[37] and it will certainly happen more often in the future. As we will see in more detail below, the EC already relies on and will have to rely in a close cooperation with the national competition authorities ("NCAs") in this regard, to avoid seeing mergers escape from its jurisdiction.

2.3. The new approach to EU mergers after the ECJ's Illumina / Grail judgment

In a Mission Letter from the President of the EC addressed to Teresa Ribera[38], Ursula von der Leyen highlighted the need for the EU to adopt a new approach to competition policies.

To modernize European competition policy, key objectives were outlined, including the revision of the Horizontal Merger Guidelines ("HMG")[39], aligning them with the resilience, efficiency, and innovation demands of the European economy, as well as the challenges faced by SMEs, taking into account the risks associated with killer acquisitions by foreign companies[40].

These goals were also confirmed by Teresa Ribera in her answers to the European Parliament stating her commitment to modernise competition policy specifically in the field of merger control, engaging on the review of the HMG in line with the Mission Letter from Ursula von der Leyen[41].

A need to strengthen competition law rules was emphasized, applying them assertively and swiftly, in close collaboration with the NCAs of the Member States. Addressing the challenges and dynamics of digital markets,

37 Information concerning the referrals and subsequent investigation of the EC: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_5778

38 Newly appointed Executive Vice-President for a Clean, Just and Competitive Transition, responsible for the Competition portfolio.

39 *See* European Commission, 2004a.

40 It is noteworthy that the Mission Letter highlights the risks of killer acquisitions carried out by foreign firms, and not killer acquisitions in general.

41 *See* European Commission, 2024a.

including platform economies and data-driven business models were also considered as top priorities under this new competition policy era[42].

Consequently, the new Executive Vice-President – Teresa Ribera – in charge of competition has been tasked with developing of a new approach to competition policies concerning merger control, particularly regarding horizontal mergers, digital and tech markets[43], and killer acquisitions conducted by foreign companies.

The EC has been fine-tuning its merger toolkit over the years. For instance, by adopting new theories of harm[44], showing closure scrutiny to digital markets and paying special attention to non-price parameters of competition[45], such as access to personal data and self-preferencing in online platforms[46], access to essential facilities, relevance of innovation and sustainability for merging parties.

An increased focus on the digital environment is expected under the revised HMG, as occurred with the revised Market Definition Notice[47].

There is also a growing recognition that the traditional static framework for assessing competition issues may not be adequate for addressing the impacts of innovation. It is necessary to include new concepts such as "dynamic competition" and "innovation competition" in merger assessments

42 *See* European Commission, 2024b.

43 It is important to highlight that after the Commission Decision of 25 September 2023 in case M.10615 – *Booking Holdings/Etraveli Group*, §§734-746, it became clear that, in the EC's evaluation, even conglomerate concentrations could raise significant competition law concerns by reinforcing network effects in digital ecosystems. *See*: https://competition-cases.ec.europa.eu/cases/M.10615. An appeal of this decision has been lodged before the General Court, Case T-1139/23, *Booking Holdings v. European Commission*.

44 *See* OECD, 2023b. *See* also M.7932 – *Dow/DuPont* of 28 July 2017, §§1993-2007, 3015 et seq. and 3297, where it became clear that for the EC non-coordinated effects were not exclusively focused on the appraisal of price effects, but also at least partially applicable to innovation. Hence, in this case, the EC conducted a post-transaction analysis on the incentives to reduce innovation efforts on overlapping lines of research and early pipeline products.

45 *See* 2024, *Competition Policy Brief – Issue 1*, (April 2024): b0042baf-a258-4c31-b31a-6331cb8d54a2_en Regarding the EC's decision-making practice *see*, for example, the following: (i) for interoperability degradation see cases M.5984 – *Intel/Mcafee*, M.8314 – *Broadcom/Brocade*, M.8306 – *Qualcomm/NXP Semiconductors*, M.9424 – *Nvidia/Mellanox*, M.9660 – *Google/Fitbit*, and M.9945 – *Siemens Healthineers/Varian Medical Systems*; (ii) for access degradation see cases M.8124 – *Microsoft/LinkedIn*, M.9660 – *Google/Fitbit*, and M. 10262 – *Meta (formerly Facebook)/Kustomer*.

46 Regarding the EC's decision-making practice *see*, for example, the following cases: M. 10262 *ibid.*, Case M.9660 *ibid.*, M.7217 – *Facebook/Whatsapp*, M.8124 *ibid.*, Case M.8788 – *Apple/Shazam*, and M.9564 – *London Stock Exchange Group/Refinitiv Business*.

47 *See* European Commission, 2024c.

to tackle the new problems posed by the digital environment[48]. It is now clear that competition is not just about interaction within given markets but also about creating new markets[49].

It is also important to note that the Mission Letter seems to be calling for an "innovation defence" theory, similar to the "efficiency defence" theory pursuant the HMG. In this regard, it should be highlighted that the HMG states that the EC should consider, on the basis of sufficient evidence, "any substantiated efficiency claim in the overall assessment of the merger"[50], opening the door to allowing mergers that might significantly impede effective competition but also show efficiencies that outweigh the potential harms generated by the merger. For this theory to be adopted, the efficiencies must be merger-specific[51], should render benefits to consumers[52], and must be verifiable[53]. We should consider that so far these criteria have been interpreted conservatively[54]. But in the future, the EC may be more susceptible to clear mergers when it is more likely than not that efficiencies created by the merger outweigh the potential negative impacts that come from such transactions.

The Mission Letter and the answers provided by Teresa Ribera to the European Parliament tend to suggest that the "efficiency defence" and the "innovation defence" may indeed play a significant role in the revised HMG[55].

The Draghi Report itself seems to adhere to the "innovation defence"[56] but also states that an innovation defence cannot be used to justify further concentration by already dominant companies or in cases in which concentration

48 *See* Kerber, *supra* n. 8, pp. 45-46.

49 *See* Dechamps & Fanton, 2018: p. 63.

50 *See* Guidelines on the assessment of horizontal mergers, *supra* n. 39: §77.

51 *Ibid.*: §§78-85.

52 *Ibid.*: §§78-84.

53 *Ibid.*: §§78 and 86-88.

54 *See* Colomo (*supra* n. 12, pp. 356-357) where he states that the two decades of enforcement of the EUMR show that the efficiency defence theory has played no meaningful role in the EC's decision-making practice. *See* also Commission Decision of 4 May 2020 in M.9409 – *Aurubis/Metallo Group Holding* (§§831 et seq.) where it became clear that the mere possibility of efficiencies materialising is not sufficient to meet the legal standard for assessing and accepting efficiencies.

55 European Commission, 2024b.

56 *See* European Commission, 2024d: p. 299: "*Likewise, updated guidelines should explain what evidence merging parties can present to prove that their merger increases the ability and incentive to innovate, allowing for an 'innovation defence'. The criteria for proving the innovation-enhancing effects of a merger must be specific enough to limit the risk of companies abusing this defence strategy, while still giving them the opportunity to justify their merger.*"

poses a significant risk of entrenching a dominant position[57], and that short-term benefits to innovation linked with economies of scale should be weighed against the merging parties' and competitors' future incentives to innovate by both companies seeking to concentrate and their rivals, clients and suppliers[58].

For the sake of consistency, this framework should be applied to the negotiation of remedies, when necessary to approve mergers that present competition concerns.

These changes should be contemplated within the revised HMG but should also find its proper place in a revised Remedies Notice giving adequate guidance to every stakeholder.

This vision of Draghi seems to embody an invitation especially directed at the EC and the NCAs, urging them to abandon the conservative and traditional approach in evaluating mergers in digital markets, giving preference to relying on the "dynamic efficiencies" instead of the "static efficiencies"[59].

Merger control inherently adopts a forward-looking perspective. However, digital and tech markets present unique challenges compared to traditional markets, as they can be swiftly transformed by new developments. The whole market can be completely replaced by new ones in a short period of time. Since the tools commonly used to evaluate mergers, such as assessing expected price changes, barriers to entry, and market shares, are static, they may not be adequate for the assessments when taken in isolation. Furthermore, traditional methods like customer surveys and requests for information from competitors may also not produce the desired results since these stakeholders may not be able to predict the future with the minimum degree of accuracy. In the realm of digital and tech markets, relying on historical data about prices, customer preferences, and costs may also not be the most effective way to forecast the impact of a merger.

Hence, Draghi calls for a more receptive stance towards considering the positive effects of mergers, whether through potential efficiencies and/or the alleged innovations conveyed by the merging parties that may outweigh the potential negative impacts of such transactions.

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57 *Ibid*.

58 *Ibid*.

59 *See* Dechamps & Fanton (*supra* n. 49: pp. 65-66) for the differences between static and dynamic efficiencies.

In a nutshell, it seems to be a proposal for a new, bolder and more flexible approach to merger control, adapted to the current reality and the increasing competitive pressure from other parts of the globe, giving birth to a new era in competition policy in Europe.

Therefore, if this challenge is embraced in the revised HMG, we may anticipate more comprehensive guidance in these crucial areas, but also find increased flexibility regarding aspects that are difficult to measure and verify, such as the strengthening of market power driven by intellectual property rights, sustainability benefits, or evolving market dynamics.

Lastly, in this regard, it is important to highlight a study conducted by Viktoria Robertson, commissioned by the EC, which analysed several mergers in the digital and tech markets carried out in various Member States, the UK, as well as other jurisdictions.

This is one of the very few studies dedicated to analysing mergers scrutinized by NCAs at the European level, and a reference for the purpose of this article since it focused its analysis in the digital and tech markets. Therefore, its conclusions are critical for understanding trends in this context. In fact, this study concluded that in the last decade there has been a significant increase in mergers within the digital sector. However, competition authorities continued to evaluate these mergers according to traditional standards, *i.e.*, horizontal, vertical, and conglomerate effects. It suggested that for the future, authorities should aim their focus on three crucial axes: (i) digital ecosystems; (ii) advantages conferred by access to personal data[60]; and (iii) the interaction of mergers and the abuse of dominance.[61]

This is indeed the correct approach. Digital markets do not have the same characteristics of the traditional ones, and the methods used in the past to determine if there is a significant impediment to effective competition need to be adjusted to the digital environment.

The positive effects highlighted by the parties in mergers, either through the efficiency defence and/or the innovation defence, must be properly considered. And following this path, it is crucial to pay attention to Draghi's vision concerning the "innovation defence" and to Viktoria Robertson's

60 *See* van de Waerdt (2023: p. 90) on the concept of data ecosystems asserts: "*The reason for such mergers, after all, is not to recruit direct competitors, but rather to expand overarching market power through the scope of the ecosystem and the network effects of personal data. Therefore, what matters is primarily whether or not the personal datasets in possession of each merging party are complementary.*"

61 *See* European Commission, 2022.

advice regarding the focus axes of the competition authorities when analysing digital and tech mergers. Only in this way can future mistakes be avoided.

In addition to what has been stated above, it is foreseeable that the EC and the Member States will revisit the notification thresholds for merger control, in order to include those that currently evade the scrutiny of their jurisdictions but whose analysis proves pertinent. We believe this measure is sound and should be regarded with acceptance. But this will inevitably take time. The process of reviewing the EUMR is no easy task.

Moreover, it is important to take into account that some Member States have adapted their notification thresholds and introduced alternative notification thresholds in terms of transaction values aiming to capture potentially problematic mergers[62]. Furthermore, other Member States like Italy have broad powers to call-in mergers for proper assessment, has occurred with the acquisition of the Israeli startup Run:AI by Nvidia[63]. And since reviewing the EUMR and ancillary legislations will take time, the EC may meanwhile incentivize Member States to review their legislations to catch potential killer acquisitions that do not fall under the EUMR, and after make use of the Article 22 EUMR to refer these mergers to the EC for its respective scrutiny. That is precisely why we envisaged above a closer cooperation between the EC and the NCAs, as regards catching potential problematic mergers that would otherwise escape the EC's jurisdiction.

Anyway, changes would be welcome, and it would be inconsistent to claim that the market evolves rapidly while simultaneously arguing that the EC and Member States should remain equipped with outdated tools.

62 The German and the Austrian merger control rules were amended in 2017 to introduce new provisions on transaction value thresholds.

63 While the acquisition did not meet the EUMR thresholds, Article 16(1) of Law no. 287 of 10 Oct. 1990 gives the Autorità Garante della Concorrenza e del Mercato ("AGCM") powers to call-in mergers that fall under the threshold, as long as certain conditions set out in Article 16(1-bis) are met. The call-in powers were introduced in 2022, and allow the AGCM to request the notification if three cumulative conditions are verified: (i) the merger was not completed more than six months before; (ii) one of the two national turnover thresholds under Article 16(1) is met or the global turnover of the involved undertakings is above 5 billion euro; and (iii) the AGCM "*recognises the existence of concrete competitive risks in the national market or in a relevant part of it, based on the information in its possession, and taking into account the detrimental effects on the development and spread of small innovative enterprises*".

3. THE DIFFICULTIES IN ANALYSING MERGERS

While it is true that *ex-ante* analyses of mergers are based on forecasts, which inevitably comprise risks, competition authorities have a set of econometric tools that reduce the uncertainty of their assessments. For example, those in charge of investigations rely on documented evidence provided by the parties (who often submit top-level expert reports)[64]; opinions from competitors, suppliers and clients; public information from private and public third-party entities; merger simulations[65]; and the experience of brilliant economists who have made a career out of analysing mergers for many years during their professional lives. These tools may provide a highly accurate perspective of the possible consequences of a merger and a clear idea as to the risks of a significant impediment to effective competition in the market.

However, *ex-ante* assessments are based on information available at the time of the analysis and the foreseeable results may therefore differ from the actual post-merger results. It is enough for a relevant competitor – considered in the assessment as one that exerts sufficient competitive pressure over the parties to the merger – to leave the market for reasons unrelated to the parties involved in the merger. This simple fact could change the analysis drastically. The departure of such a competitor could alter market conditions and have a devastating effect on the sound assessment carried out by a competition authority.

Other situations of greater complexity may be considered, such as the development of a new technology that revolutionizes the market, changes in consumer preferences, financial crises, legislative changes that create barriers to entry for new competitors or encourage the exit of some of the existing ones, among many other eventualities that may elude analysis, even if diligent, by those responsible for competition assessments.

Although such complexities might arise with standard mergers, they are far more frequent in the context of big tech and digital markets where developments proceed at an astonishingly rapid pace. This environment renders it exceedingly challenging for case-handlers to master the nuances of the products or services and markets under scrutiny. They must possess the acumen to pose the right inquiries, thereby eliciting the requisite responses for a comprehensive evaluation. It is unrealistic to expect that the involved parties

64 It is true that the views embodied therein are sometimes skewed and require close scrutiny by the authorities.

65 *See* Baker, 2011.

will voluntarily disclose potential issues that could significantly impede effective competition, as this could compromise the likelihood of obtaining the merger clearance without remedies.

3.1. The advantages of an *ex-post* reaction to mergers

In a study conducted by one of the most eminent US antitrust economists – John Kwoka[66] – dozens of mergers and their effects on the products traded were analysed in the US. Out of the one hundred and nineteen products analysed after the merger occurred, the change in price in forty of them was more than 5% and, in twenty-three products, the change in price was more than 10%[67].

By the same token, in the book "The Myth of Capitalism – Monopolies and the Death of Competition", there is a comprehensive account detailing numerous mergers in the US that subsequently led to significant price increases for products, without delivering any additional benefits to consumers[68].

Although the solution may sound strange in a European competition law context, in the US, according to the US pre-notification system provided for in the 1976 Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. §18a[69], there appears to be a possibility of reviewing mergers that have already been examined and approved in the United States[70]. This means that if anything was omitted or insufficiently performed during the merger assessment process, there is no obstacle to the matter being revised[71].

In the last twenty years, at least three mergers have been revised after their approval: (i) Chicago Bridge & Iron/Pitt-Des Moines; (ii) Hearst/

66 Indirect quotation from the article written by Patel (2020: pp. 37-38). The author also mentions other studies which concluded that similar analyses have proven that there are many mergers which have caused damage to competition in the market and a loss of consumer welfare.

67 For a summary and analysis of this work conducted by John Kwoka, *see* Vita & Osinski, 2018.

68 *See* Tepper & Hearn, 2019.

69 *See*: https://www.ftc.gov/sites/default/files/attachments/premerger-introductory-guides/guide1.pdf

70 *See* Title 15 U.S.C. §18a (i) (1) states that: "[a]*ny action taken by the Federal Trade Commission or the Assistant Attorney General or any failure of the Federal Trade Commission or the Assistant Attorney General to take any action under this section shall not bar any proceeding or any action with respect to such acquisition at any time under any other section of this Act or any other provision of law*". *See* the full text of Title 15 of the US Code: *Commerce and Trade*, chapter 1: *Monopolies and combinations in restraint of trade* and, in particular, §18a on pre-notifications and the standstill obligation in https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title15-section18a&edition=prelim.

71 Patel, *supra* n. 66: p. 13.

Medi-Span; (iii) Deere/Precision Planting[72]. More recently, in 2020, the FTC decided to revisit the acquisition of Instagram by Facebook after closing the investigation in August 2012[73].

In 2020 the FTC sued Facebook alleging that the company illegally maintained its personal social networking monopoly through a years-long course of anticompetitive conduct. The complaint alleged that Facebook initially tried to compete with Instagram on the merits by improving its own offerings, but Facebook ultimately chose to buy Instagram rather than compete with it. Facebook's acquisition of Instagram in April 2012, according to the FTC, both neutralized the direct threat posed by Instagram and made it more difficult for another personal social networking competitor to gain scale.

Also, by 2012, WhatsApp had emerged as the clear global "category leader" in mobile messaging. Facebook chose to buy an emerging threat rather than compete and announced an agreement in February 2014 to acquire WhatsApp[74]. Facebook's acquisition of WhatsApp, according to the FTC, neutralized the prospect that WhatsApp itself might threaten Facebook's personal social networking monopoly and ensured that any future threat would have a more difficult time gaining scale in mobile messaging.

Hence, the complaint alleged that Facebook has engaged in a systematic strategy – including its 2012 acquisition of up-and-coming rival Instagram, its 2014 acquisition of the mobile messaging app WhatsApp, and the imposition of anticompetitive conditions on software developers – to eliminate threats to its monopoly. Without prejudice to these mergers having been scrutinized in the past, for the FTC, this course of action harms competition, leaves consumers with few choices for personal social networking, and deprives advertisers of the benefits of competition, therefore justifying the need to revisit these mergers. The FTC is now seeking a permanent injunction in federal court that could, among other things: require divestitures of assets, including Instagram and WhatsApp; prohibit Facebook from imposing

72 *Ibid.*: pp. 18-19.

73 In 2012 the FTC closed the investigation of Facebook's proposed acquisition of Instagram, Inc., without taking any action. After a Commission vote (5-0) the FTC concluded that the deal could proceed as proposed by the parties, as information available at: https://www.ftc.gov/news-events/news/press-releases/2012/08/ftc-closes-its-investigation-facebooks-proposed-acquisition-instagram-photo-sharing-program. For a concise summary of the investigations regarding the acquisition of Instagram by Facebook by the OFT and FTC *see* Jenny 2021: pp. 30-34.

74 *See:* https://www.ftc.gov/news-events/news/press-releases/2014/04/ftc-notifies-facebook-whatsapp-privacy-obligations-light-proposed-acquisition

anticompetitive conditions on software developers; and require Facebook to seek prior notice and approval for future mergers and acquisitions[75].

Consequently, the possibility of an *ex-post* reaction to a merger, with more reliable market information, could have the virtue of mitigating the damage caused. The option of intervening *ex-post* in the context of merger control would enable the correction of the errors detected in relation to the preliminary assessment and (at least in theory) would allow for an increase in consumer welfare.

In addition, if the parties to the merger are aware of the likelihood of an *ex-post* review – even in situations in which the merger has been analysed by one or more competition authorities –, there would be a natural incentive for the companies involved to self-discipline their actions in the market, avoiding behaviours that might be detrimental to effective competition in the future.

3.2. The downside of an *ex-post* reaction to mergers

Taking the above into consideration, it can therefore be concluded that there are advantages to an *ex-post* review of mergers through which the EC and NCAs can reassess mergers that have been previously analysed and to which they expressed a clearance decision. Such *ex-post* reviews could, at least potentially, increase consumer welfare[76].

Nevertheless, there are certainly drawbacks to this type of review, the worst of which is the damage to legal certainty. Legal certainty and the safeguarding of legitimate expectations constitute the bedrock of a democratic society governed by the rule of law. Without such certainty, individuals are incapacitated in their ability to effectively organize their lives. There is a dire lack of incentive to invest in research and development ("R&D"), establish enterprises, and create employment opportunities, as individuals find themselves subject to the whims of the state and the capricious assault on economic freedom and private property.

What would be the purpose of the pre-notification system if the reply given by the competition authorities was labelled as "provisional"? In today's

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75 *See*: https://www.ftc.gov/news-events/news/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization. It is also worth mentioning that the case has received special attention from the media: https://www.ft.com/content/4ce636d2-8438-4a68-821b-74dc7a150d52 and https://www.ft.com/content/42e05de2-04e3-4408-b603-2f9df9c8c22c. It has even been subjected to strong criticism from the press: https://www.economist.com/leaders/2025/04/15/zuckerberg-on-trial-why-meta-deserves-to-win

76 *See* Patel, *supra* n. 66: p. 38. The author claims, nevertheless, that there are criteria for and limits on the possibility of *ex-post* review in the US: pp. 46 et seq.

business world, a provisional reply by the authorities is like a storm at sea: *no use to anyone*.

This solution could have very negative effects on investments in dynamic markets, as it may hold back investments and lead to a detrimental effect on consumer welfare development.

In other respects, a provisional reply when assessing a merger by the EC or the NCAs could diminish the authorities' obligation of diligence when analysing a merger. If competition authorities are aware that they may have another opportunity to address the issue, it is conceivable that the diligence exhibited by case-handlers will not reach the pinnacle of their capabilities. This stems from natural human behaviour. Knowing that there is only one opportunity to achieve the desired results often compels individuals to exert their utmost effort, ensuring the highest quality of work.

Having the possibility to reevaluate the merger against the will of the parties may therefore be harmful to undertakings and to the credibility of the merger control procedure. The situation would be worsened if the *ex-post* review required structural remedies, such as divestments. In these cases, the entire integration process – which is often costly for companies and workers, and at times, even for clients and suppliers – would have to be reversed. Often, we are met with the perplexing question: *how does one unscramble a scrambled egg?* While reversing a merger may even be technically feasible, what are the true costs to the parties, employees, and consumers? Which guidelines should we adhere to? What are the implications for legal certainty and predictability in competition law in the short, medium and long term? Most crucially, how can we guarantee that, in the end, consumers will truly benefit from such a reversal?

There can be no assurance that the benefits to consumer welfare or effective market competition would be greater than the disadvantages caused by such remedies. In many cases, it is akin to flipping a coin and relying on a deep-seated belief that structural remedies will function as intended and yield positive results.

Additionally, it is possible that given the risk of reversal, merger integration in the wake of the competition authority's decision would be slower and more cautious, with a negative impact on the market. In such situations, it is highly likely that society would take longer to reap the benefits and synergies offered by a good merger.

Furthermore, there is another downside: a mistake in the assessment by the authorities during an initial analysis would not enable companies to duly study and opt for a better investment in the market, whereas an immediate decision to prohibit a merger allows companies to analyse other investment options with possible benefits for consumers. There are even many situations in which, faced with the impossibility of buying a competitive or an adjacent business in the first instance, companies choose to build up and/or develop the competing or adjacent business themselves. In this way, they generate competitive pressure on the business of the pre-existing operator (former target in the merger transaction). This situation – of developing a competitive or adjacent business – becomes harder (if not impossible) after a merger authorised by the competition authorities is revised *ex-post* and disinvestment imposed, since it is most likely that the available funds were used for the initial acquisition.

Thus, adopting more rigorous criteria for the analysis of mergers, and possessing the resolve to prohibit them with greater frequency when appropriate, may be preferable to undertaking an *ex-post* review. This approach ensures that all facets of the merger are meticulously scrutinized, thereby engendering an expectation among stakeholders – be they parties, workers, or consumers – that the merger will not be detrimental to competition.

At least for the time being, the European legal system does not envisage the possibility of an *ex-post* analysis of mergers. Especially for mergers that have already been reviewed by the competent competition authorities. The principle of legal certainty limits the power of the authorities to re-examine mergers once a final decision has been reached[77].

This means that any solution that allows a merger to be revised *ex-post* would require a change in the current legislation, which would not be impossible, as it is a political decision to be made by the EU legislators. However, it would be a decision laden with the advantages and negative consequences mentioned above. From our perspective, we identify more drawbacks than potential benefits arising from a legislative approach such as this.

4. THE EU REMEDIES' POLICY FOR MERGERS

EU competition law remedies are of the utmost importance. A significant part of the success in controlling mergers involves the application of remedies. These allow companies to proceed with the desired mergers while

77 There are exceptions. For example, if the parties have provided false or misleading information that is used as the basis for a competition authority's decision not to oppose a merger.

ensuring that the negative effects of such mergers do not occur or are at least minimized.

There is a clear perception that if the remedies are ineffective in restoring healthy competition, it can lead to a discrediting of the purpose of merger control. Likewise, an overdose of remedies could have even more detrimental effects than an insufficient dosage of remedies. To protect competition, remedies must be chosen appropriately and applied at the right time. This issue is addressed in the EC Notice on Remedies[78]. According to this Notice, remedies imposed on undertakings must comply with the following principles: (i) opportunity, (ii) proportionality (subprinciples of *strictu sensu* proportionality and necessity)[79], and (iii) efficiency (in terms of specificity, transparency, accuracy, speed and viability)[80]. In addition, any such remedies must be subject to supervision and control[81].

The principle of proportionality means that the measures adopted must be appropriate – *strictu sensu* proportionality – (*i.e.*, the remedies must be capable of solving the problems detected while not destroying the benefits and efficiencies generated by the merger), and necessary for attaining the desired objectives (*i.e.*, if there is more than one possible remedy, the one that causes the least harm to the undertakings involved must be chosen).

As mentioned above, there is a wide-spread perception that competition levels have decreased in various sectors, partly due to higher levels of industry concentration[82]. But the truth is, when it comes to mergers and the impact generated by prohibited or authorized merger involving remedies, much remains unclear. And part of this is because constantly monitoring the impacts of these decisions is not an easy task. In this context, there has been a movement towards more frequent assessments of the impacts of mergers on markets, including the effects of applied remedies. There are a few relevant studies on this matter published within the OECD[83], ICN[84], and even

78 *See* European Commission, 2004b ('Notice on Remedies').

79 *See* case C-202/06 P, *Cementbouw Handel & Industrie BV v Commission of the European Communities*, 18 December 2007, ECLI:EU:C:2007:814: §52.

80 The requirements are listed in the footnote on p. 3, §§7 and 9 of the Notice on Remedies, *supra* n. 78.

81 *See* Notice on remedies, *supra* n. 78: §14.

82 *See* OECD, 2023c: p. 6.

83 *Ibid*.

84 *See* ICN, 2022.

the EU[85]. In the latter study, dated from 2005, it presents the drawback of focusing on the reference period from 1996 to 2000, while between 2000 and 2005, the EU made significant changes to its merger policy[86].

Through these studies, it became evident the need for a more coordinated and frequent approach to merger control among various national, European, and global competition authorities. Furthermore, it is particularly important to stress Viktoria Robertson's conclusions after analysing ninety-seven national digital and technology merger cases from nineteen different EU Member States and the UK, from the time period 1 Jan. 2015 to 31 Dec. 2021, when she stated that the ratio of unconditionally cleared to conditionally cleared or prohibited mergers, already provides a first indication that most digital and technology mergers are understood to be unproblematic by the NCAs[87].

We should also mention that, in the context of mergers, the EC and NCAs often opt for structural remedies[88]. According to the EC long-standing pol-

85 *See* European Commission, 2006. *See* also Robertson, *supra* n. 61. This latter study, commissioned by the EC, contains an independent expert report on the national assessment of horizontal and non-horizontal mergers in digital and technology markets. It analyses the substantive assessment of digital and technology merger cases from selected EU Member States, as well as the UK, against the background of the growing concern about the market power of big tech and digital companies.

86 Approving the old 2001 Notice on remedies, the standard texts for divestiture commitments and trustee mandates in 2003, and the EUMR in 2004.

87 *See* Robertson, *supra* n. 61, pp. 5-6.

88 *See* Notice on remedies, *supra* n. 78, §§10-17. Moreover, as stated in the *Competition Policy Brief* (European Commission, 2022a): "*Remedies in digital and tech markets remain a disputed topic, with certain commentators suggesting that digital mergers should not be allowed to proceed without structural remedies. (…) Evidently, in horizontal cases, the Commission generally does not accept remedies falling short of a divestiture. But in non-horizontal mergers, other commitments may be suitable to resolve concerns if those remedies are equivalent to divestiture in their effects. The Commission may investigate other solutions proposed by the parties to address non-horizontal concerns, as per the applicable case law. As a result, in specific circumstances, the Commission has accepted remedies that either consisted in a form of access to infrastructure, networks, services, data, or the granting of certain rights to third parties guaranteeing the interoperability of complementary elements (so-called "interoperability" remedies), both on a non-discriminatory and transparent basis.*". On the possible inconsistency of the EU's remedies policy, *see* Loertscher & Maier-Rigaud (2020: pp. 54-55). These authors highlight the fact that the theories of harm in the context of antitrust and mergers are very similar, if not identical. The difference is that in antitrust investigations, actual infringements are under investigation, as opposed to in mergers, where the investigation concerns potential harm in the future as a result of a merger. However, in antitrust investigations, behavioural remedies are normally applied, whereas structural remedies are normally applied in mergers. In addition, for these two authors, the possible incoherence in the remedies policy can be justified by the EC's and NCA's different position of power in these different scenarios. In merger control proceedings, the parties are "in the hands of the authorities" if they want a rapid solution for the merger. They cannot close the transaction without clearance by the EC (or the NCAs). However, in an antitrust context, the EC and the NCAs cannot apply the same pressure. Appeals to the courts and lengthy discussions concerning the remedies imposed tend to give less power to the authorities (p. 72).

icy, divestitures are the best way to eliminate competition concerns resulting from horizontal overlaps[89].

In most of these situations where structural remedies are the preferred solution, the reason is associated with the absence of a need to monitor remedies[90]. This is the easiest solution, and it fulfils the objective of remedies being supervised and controlled. Even paragraph 14 of the Notice on Remedies states that the EC may reject the proposed measures if they cannot be effectively monitored and when the lack of effective monitoring diminishes or eliminates the effects of the proposed remedies.

According to these EC guidelines – set down in the Notice on Remedies and often applied by the EC and NCAs –, if a certain behaviour guarantees effective competition but monitoring is difficult, it must be rejected. It appears therefore that the predominant value in competition law, in the context of remedies for mergers, is monitoring and surveillance and not effective competition *per se*.

Yet this is a surprising solution. We understand the difficulty in monitoring behavioural remedies, especially when the funds available to the NCAs are relatively limited considering the mission entrusted to them. We definitely share the concerns of the authorities in this regard. However, it is not easy to combine the idea of rejecting remedies due to the difficulty in monitoring them with the fundamental principle of proportionality. Nor can it be accepted that monitoring remedies is more important than embracing solutions that may contribute to effective competition in the internal market, the latter of which is enshrined in the Treaty of the European Union and the Treaty on the Functioning of the European Union[91].

This is not to say that behavioural remedies are always the best tools in the context of mergers. A particular situation must be analysed to identify the

For a contrasting theory, *see* Ritter, 2006: p. 30. This author considers the EC's remedies policy to be logical and coherent, given that in merger control proceedings, anticompetitive structures are prohibited in the market (requiring intervention in the shape of structural remedies), as opposed to antitrust rules, which prohibit anticompetitive behaviours (requiring behavioural remedies). Even so, this latter position does not explain why we often find structural remedies in the antitrust infringement context, especially with abuses of dominant position, and behavioural remedies in a merger review context.

89 *See* Notice on remedies, *supra* n. 78.: §17.

90 *See* the joint statement, *supra* n. 10: §§16-17.

91 *See* no. 3 of Article 2 of the Treaty of the European Union and the Protocol (no. 27) on the internal market and competition in the Treaty on the Functioning of the European Union. For that matter, we should also consider section 6 of the EUMR.

specific problem or problems and choose the remedy which guarantees that effective competition will not be affected as a result of the merger[92].

The parties must of course offer guarantees that the remedies will be respected and later fulfilled – which cannot merely be a declaration of intent –, or face the possibility of annulment of the adopted decision and potential fines for failure to comply with the remedies[93].

As mentioned above, merger cases in the digital and tech sectors show that many mergers involve undertakings operating in vertically-related or adjacent markets. This may imply that divestiture may not always be the best solution to address competition concerns. If competition concerns can be eliminated through other ways, non-divestiture remedies can enable the EC and the NCAs to intervene proportionately to resolve non-horizontal issues. However, when such solutions are indisputably unavailable or are unequivocally ineffective, prohibition may be the most suitable course of action.

4.1. The possible deficiency of the remedies' policy in general in the context of EU merger control

As mentioned above, there are few studies available that focus on the impacts of the remedies adopted by the EC and NCAs in the context of merger control. Notwithstanding the difficulties involved in carrying out this type of studies and the inevitable uncertainties that are unknown (e.g., the failure of a remedy due to poor management by the buyer and not the remedy itself), the truth is that the findings of the available studies do not confirm that the EC's structural remedies policy until now has been a great success[94]. We therefore consider crucial to review the recent and past decisions on remedies

92 In this regard, reference should be made to case T-87/05, *EDP - Energias de Portugal, S.A. v. Commission of the European Communities*, 21 September 2005, ECLI:EU:T:2005:333, §200. It should also be pointed out that Oliver E. Williamson's doctrine still applies, whereby in order to defend a merger, the parties are required to demonstrate that the savings achieved through greater efficiencies outweigh the losses to effective competition and consumer welfare. The savings costs should also be considered a social benefit – and not only beneficial to the parties –, given that the savings would be equivalent to resources that would be available to increase spending in other areas of the economy. Even in monopoly mergers, a portion of the costs savings is often passed on to consumers – *see* Shelanski & Sidak, 2001, p. 20.

93 *See* recital 31 of the EUMR, as well as case T-177/04, *Easyjet Airline Co. Ltd. v. Commission of the European Communities*, 4 July 2006, ECLI:EU:T:2006:187, §188.

94 It was certainly not a disaster either. But the fact is that at the present stage we just do not have enough information to reclaim positive results. Empirical evidence as to the advantages of structural remedies as a preferential solution is still weak. There is a lack of studies that monitor the consequences of imposing structural remedies and test them against the counterfactual scenario of behavioural remedies.

to determine their impact on prices, choice of products, quality and innovation. This regular examination, by the EC and the NCAs, of the effects of the remedies is therefore essential and probably requires increasing the budgets of the authorities for such an ongoing task.

Monitoring mergers, remedies and their effects are of the highest importance for everyone. Without performing this in-depth evaluation and with a more often cadence, life is made more difficult for undertakings without any guarantees that the benefits accruing to the competitive process and society in general are not exceeded by the costs imposed on them when such remedies are adopted. Nor does one know, at least with the minimum degree of certainty, whether the imposition of structural remedies is the best solution for safeguarding healthy competition in the market.

To continue favouring a policy of structural remedies over behavioural remedies, it must become unequivocal that society at large benefits more from the imposition of structural remedies rather than behavioural ones, despite the higher cost of monitoring the latter type of remedies. This is a result of the fundamental principle of proportionality. Furthermore, concrete information about the counterfactual in the scenario of imposing structural remedies to clear mergers must be provided. It must be clearly explained, not only on theoretical terms but also in practice, why behavioural remedies cannot be considered as an appropriate solution. And in several cases, that is not the standard practice adopted by NCAs.

With the currently available data, the assumption that divestments – without taking prohibitions into consideration – are the most efficient solution for ensuring effective competition when faced with the threat of a merger significantly affecting competition in the market is far from being unanimous[95]. The idea must be tested more often. It must be checked against the changes in the market. Finally, data must be published for the sake of the credibility of the merger control system, especially in dynamic markets[96].

4.2. The need for a different approach to remedies in the digital and tech markets in the context of EU merger control

The trend in the EU is to give big tech companies and digital platforms that have reached a significant market position less leeway than traditional

95 *See* the Notice on Remedies, §22.

96 Stressing that we know too little about the actual effects of remedies and that there is a need for further data and analysis *see* Kwoka, 2020: p. 15.

operators[97]. It is true that some of these big tech and digital platforms grow extremely quickly, and in certain situations there are abuses that must be controlled[98]. In this latter case, heavy sanctions are very welcome. These behaviours should be totally unacceptable.

Moreover, the assessments conducted by competition authorities (including the EC) must include network effects since, in such situations, the product increases in value according to the number of people connected to the product or service. Thus, the higher the benefits of the network, the higher the costs for consumers to change. There is therefore a dangerous lock-in effect in most of these situations[99].

Yet many big tech companies and digital platforms also create significant benefits for consumers who are able to profit from the synergies and effects of the network strengthened by the merger, which is why they achieve a large number of subscribers in short periods of time. It is not luck or mere chance. These companies often do provide what others are not able to offer and it is crucial to have that into account.

Furthermore, in many of these markets, barriers to entry of new providers and exit of others are minimal. As mentioned above, many innovative companies with the potential to disrupt business are entering the market.

Therefore, the relevant issue is whether the prevailing rule of divestment and the need to apply structural remedies – by the EC and NCAs – makes sense in highly dynamic digital markets, given that companies in these markets often last for short periods of time and the future of the market itself is also very hazy[100]. Besides, there are insufficient precedents to be used as a

97 The major concern is related to the use of data and artificial intelligence. For personal data, we now have the GDPR, and for artificial intelligence we now have the Artificial Intelligence Act approved by Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 Jun. 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) 300/2008, (EU) 167/2013, (EU), 168/2013, (EU), 2018/858 (EU), 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828.

98 There are several decisions adopted by the EC and NCAs that are public, detailed and very clear confirming this reality. Therefore, a comprehensive reference in this context is not necessary, especially with regard to killer acquisitions.

99 *See* Shelanski & Sidak, *supra* n. 92, pp. 4, 7-8.

100 A clear example of our times is DeepSeek, which now threatens the survival of recent AI solutions from Google and OpenAI. We were just now getting acquainted with these digital solutions from Google and OpenAI, and unexpectedly, a Chinese competitor emerges from a blind spot providing identical results and much cheaper than the first two solutions. For this purpose *see*: https://www.politico.com/newsletters/digital-future-daily/2025/01/27/whats-behind-the-deepseek-freakout-00200813 and https://www.politico.eu/article/europe-ai-scene-hope-china-deepseek-ai-model-r1-success/

reference and we are not even sure that these precedents may play an important role for this purpose.

Digital, big tech and dynamic markets often move in different and unexpected directions[101] and the risk of a more radical intervention could prove detrimental. Perhaps, in these situations, there should be room for greater flexibility.

In dynamic markets dominated by big tech companies, the current EU merger control framework and remedies may not adequately address the complexity and future uncertainties of these fast-evolving sectors.

Dynamic markets, especially in tech, are characterized by rapid innovation, unpredictable business models, and limited visibility into long-term competitive effects. Imposing structural remedies or blocking mergers based on perceived risks may inadvertently stifle innovation and prevent consumer-beneficial growth.

Given these uncertainties, the EC and NCAs should adopt a more flexible approach, allowing mergers to proceed when there is insufficient evidence of anti-competitive effects, especially when balanced against the potential for pro-competitive, innovation-driven outcomes[102], and even the principle of proportionality since the EC and NCAs are obliged to keep the costs of the merging parties to a minimum and adopt speedy decisions wherever possible[103].

Besides, this approach would be more in line with Article 2 of the EUMR since the EC is legally obligated to approve transactions that do not significantly hinder effective competition and to declare that concentrations which would have such effects are incompatible with the internal market. As stated by Pablo Ibáñez Colomo, the legislation does not grant any discretion to the competition authorities[104].

101 Petit (2020) provides numerous detailed and fascinating examples of how big tech companies have ventured into unexpected areas, bewildering public expectations, outmanoeuvring rivals, and occasionally startling even their own founders and strategists.

102 *See* Colomo, 2020: pp. 247-248.

103 *See* Hoeg, 2014: p. 31.

104 *See* Colomo, *supra* n. 12, p. 371. Notwithstanding, this author also recognizes that the absence of a structured set of criteria, together with the lack of discernible boundaries to the SIEC test, affords the EC substantial leeway over horizontal mergers under the EUMR. Under this interpretation of Article 2, competition authorities could simply point to the inevitable loss of competitive pressure and conclude, on that basis, to the prima facie incompatibility of the transaction with the internal market. It is not easy for the merging parties to rebut that prima facie finding – *ibid.*, p. 359.

The view stated above would also be aligned with the main ideas conveyed by the Draghi Report.

4.3. A new proposal to address the remedies' policy in the digital and tech markets in the context of EU merger control

Taking the above into consideration, instead of imposing structural remedies based on perceived risks, competition authorities (including the EC) could consider an alternative scenario: competition authorities could mandate a detailed business plan from the merging parties, covering a 10-year period with specific milestones at two, four, six, eight, and ten years[105]. This plan would include projected product and service portfolios, anticipated pricing strategies, expected client base, key competitors, supply chain structure, turnover expected and prospective growth of each business unit, as well as actual or potential barriers to entry. Additionally, merging parties would need to disclose foreseeable events that may impact the market structure, such as technological shifts, regulatory changes, expected consumer behaviour changes, and potential partnerships or acquisitions.

Requiring these concrete details and time-bound goals ensures that competition authorities assess specific commitments rather than vague projections, leading to a more precise and dynamic assessment of a merger's potential impact.

A critical component of this approach is making merger clearance decisions conditional upon the merging parties' adherence to behavioural remedies aligned with the commitments laid out in their 10-year business plan. These behavioural remedies would ensure that parties stick to the milestones and goals conveyed to the EC or to the NCAs, safeguarding innovation and market growth. Should the parties fail to meet the agreed-upon business plan, milestones, or commitments, pre-approved structural remedies, held in reserve when adopting the behavioural remedies, would automatically take effect, providing a swift corrective mechanism to preserve competitive conditions[106].

This solution could be even more effective by imposing compulsory pecuniary sanctions for each day of delay in implementing the pre-approved

105 It would be perfectly feasible to establish a much shorter period, depending on the context of each merger case.

106 We consider it entirely feasible to implement structural remedies subject to a suspensive condition, together with behavioural remedies that would come into effect immediately following the clearance of the merger.

structural remedies, conditioned on the non-compliance with the behavioural remedies. Such a measure would strongly encourage companies to convey information honestly and accurately to competition authorities. It would also motivate them to strictly adhere to the established behavioural remedies and expectations set by the information provided during the merger assessment.

The above would naturally require changing the type of information needed to notify mergers in the digital context. However, this would not be an insurmountable task.

There is no doubt that this solution would have the disadvantage of potentially delaying the process of adopting a final decision by the competition authorities, due to the possibility of negotiating behavioural remedies (in line with what the parties have communicated during the notification proceedings), as well as negotiating structural remedies to be triggered if the first ones fail. However, the parties would have the freedom to shorten this negotiation period by choosing to move directly to the exclusive discussion of structural remedies.

Despite the criticisms that may arise regarding this solution, the truth is that it has the enormous advantage of the authorities not immediately jumping to structural remedies – particularly divestments – without knowing if these might be excessive.

On the other hand, to avoid the typical criticism about the difficulty of monitoring behavioural remedies, EU Member States could establish a panel of independent arbitrators with expertise in economics and competition law, capable of analysing cases swiftly and accurately. This panel would provide a streamlined, efficient arbitration mechanism for any stakeholder who detects deviations from the agreed behavioural remedies. Decisions adopted by the arbitrators should be final and unappealable, ensuring prompt enforcement and avoiding lengthy litigation that could harm competitive conditions.

Furthermore, in the event of detecting a breach concerning the behavioural remedies agreed upon, the merging parties would bear the costs of arbitration, this way incentivizing adherence to the behavioural remedies[107].

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107 On the subject of arbitration and competition law disputes *see* Marquis & Cisotta (2015: pp. 243-313), as well as Pinto Monteiro (2015, pp. 89-98).

4.3.1. Solutions to guarantee effectiveness

To ensure the effectiveness of this approach, several other mechanisms could be implemented to further enhance compliance and oversight:

- To promote maximum transparency, merging parties could be required to share anonymized or aggregated market data with the general public (*i.e.* consumers, competitors and other stakeholders). Making this data publicly accessible would help verify compliance with behavioural remedies, thereby reducing the monitoring burden which falls under the jurisdiction of competition authorities. This approach would perhaps promote public accountability and would also serve as an effective fact-checking mechanism. This would augment transparency and empower consumers, competitors, and other stakeholders to better understand and even contribute to the positive impacts of mergers within the digital economy. Such openness could foster a more competitive environment, allowing for quicker detection of any negative impacts should they occur;
- Periodical reports detailing progress submitted to a monitoring trustee and/or directly to the EC or NCAs could be required, detailing their achievements against the previous conveyed milestones. These reports would include not only the progress towards commitments but also market dynamics or emerging issues. This strategy would establish a proactive oversight framework, where competition authorities would receive (directly or indirectly) consistent updates without imposing excessive regulatory burdens, thereby ensuring supervision while preserving the flexibility needed in digital and big tech markets. These documents could even be used by third parties as proof of misleading information and wrongdoing in the arbitration proceedings mentioned above;
- Competition authorities could enhance oversight by appointing independent third-party firms specialized in economics, competition law and market analysis to monitor and report on the merging parties' progress. These could even work alongside with the monitoring trustee. Engaging these external monitors would ensure neutral, expert insights without burdening the authorities with administrative oversight. This system would guarantee a high standard of monitoring that upholds independence and impartiality, much like the auditing companies that rigorously audit corporations' accounts;

- Companies might benefit from a reward system that acknowledges their adherence to or exceeding pro-competitive objectives. Companies that fully comply with their behavioural commitments could receive an antitrust compliance stamp[108]. This public recognition could incentivize companies to uphold their commitments, understanding that maintaining competitive integrity not only benefits the market but also enhances their own future operations and public image. This could be complemented by an antitrust scorecard that companies must publish on their websites and in their annual reports. Scorecards would evaluate whether companies are complying with the expectations conveyed to the competition authorities during merger assessments or if any deviations are detected. Consequently, the level of compliance with competition laws would become public knowledge. These tools might create incentives for companies to provide full disclosure when notifying mergers and to adhere to the agreed business plans shared with competition authorities in due time;
- Behavioural and structural remedies should include time limits, prompting competition authorities or an independent expert panel designated for that purpose to regularly evaluate their necessity. A predefined period should be set after which these remedies would be reassessed or discontinued. If the merger is found to be competitive or neutral, lifting these remedies would be possible, ensuring flexibility and preventing indefinite restrictions that may become obsolete;
- Digital platforms which have unique competitive dynamics and may present specific challenges, should be approached with tailored remedies that consider factors like data privacy, interoperability, or openness to third-party developers. By setting conditions specific to platform-based businesses, competition authorities can create a more nuanced oversight framework that recognizes the distinctive nature of these mergers and targets potential risks more effectively.

4.3.2. Enhancing mechanisms to ensure effectiveness

In a more daring approach – which will inevitably draw some criticism regarding its application, as it does not allow for immediate resolution of cases and

108 This stamp would not be granted to companies with an antitrust violation background or could be removed at any time for breach of competition law.

does not guarantee the desired legal certainty – the following mechanisms may also be explored:

- There could be a possibility of reviewing or adjusting behavioural and/or structural remedies previously agreed upon by the notifying parties and competition authorities. This review or adjustment could be executed by the competition authorities themselves or by a panel comprised of legal and economic experts in competition law. Such a review would be exceptional and conducted based on periodic evaluation reports prepared by independent entities, and on anonymized and aggregated data made available to the public, as mentioned above. This mechanism would allow remedies to be adjusted to the dynamic and often unpredictable market conditions;
- Competition authorities may also consider the possibility of clearing mergers subject to a phased implementation of the merger when this is technically feasible. In this context, the approval of the merger would be conditional on certain market segments and/or smaller geographic areas showing the desired results, functioning this mechanism as a pilot test. If these markets demonstrate that the impact of the merger matched the expectations presented to the competition authorities, the merger could proceed and be implemented in its entirety;
- To enable the implementation of the aforementioned mechanisms, a direct communication channel with consumers could be created, where periodic surveys on the impacts of the merger would be conducted. With the introduction of AI in the working environment of competition authorities – which is an inevitable reality – this process will become increasingly easier. This feedback, gathered directly from the market, could be crucial in providing a broader view of the impact of a merger on consumers and the market in general. This model would value feedback from consumers and other stakeholders like clients and/or competitors. It would be expected that these surveys could be conducted automatically in the future using AI, and the results could also be processed using the same tools, so that the reassessment workload of the competition authorities could be minimal;
- In more severe cases of violation of behavioural and/or structural remedies, where the antitrust compliance stamp is withdrawn and the antitrust scorecard reveals poor performance, a prohibition could be considered, preventing companies from participating in other mergers for a specified

> period. It would be a form of temporary prohibition on carrying out certain activities. For instance, similar to the restriction where participants in cartels are barred from entering public tenders as part of ancillary sanctions.

This approach acknowledges that prospective analyses can lead to unexpected outcomes, where the anticipated competitive effects of imposed remedies differ from initial predictions. Consequently, the identified competition concerns may be either excessively addressed ("type 1" errors) or insufficiently resolved ("type 2" errors). These misjudgments may be frequent in the digital and tech sectors, where case-handlers often struggle to fully grasp the intricacies of the business environment. As Dorte Hoeg correctly concludes, excessive remedies eliminate not only the identified competition concerns but also reduce anticipated efficiency gains and thus pro-competitive effects stemming from the merger[109].

By implementing these tailored, flexible, and new oversight mechanisms, competition authorities can ensure that merger control policies in dynamic markets are forward-looking and responsive to the realities of the big tech market. By focusing on behavioural instead of structural remedies as a rule, the EC and NCAs can allow merging parties to keep their existing frameworks that support long-term R&D and innovation plans. These plans may be hindered if divestitures or structural changes are imposed as primary solution due to the challenges encountered in monitoring remedies.

Conditioning clearance on behavioural remedies, enhanced monitoring, and data transparency, combined with incentivized compliance and independent arbitration, offers a balanced approach that upholds competitive integrity while fostering growth and innovation. This strategy not only better aligns with the complex, uncertain landscape of digital and big tech markets but also creates a more practical, responsive EU merger control framework that benefits consumers, promotes healthy competition, and preserves the agility required for sustained innovation.

In a nutshell, in an unpredictable environment, it is essential to adopt a position of greater flexibility[110]. Care must be taken not to use competition law as a tool to restrict healthy competition in the market.

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109 *See* Hoeg, *supra* n. 103, p. 29.

110 This would also mean that in the case of a merger with obvious restrictive effects, such a merger must be prohibited, or less flexible remedies would be required to ensure that effective competition would not be hindered.

The Merger Control in Dynamic Markets published by the OECD also advocates for a more dynamic and long-term analysis[111]. It acknowledges that the current tools used by competition authorities (and the EC) are highly focused on the past – past decisions used as guidelines –[112] and that it is extremely difficult in the present context to make an assessment based on effects[113].

Similarly, traditional concepts such as the "degree of concentration of the market" are not a guarantee for a successful enquiry either. According to the OECD, market concentration is a static tool that may indicate little competition in the market, but also that companies with scale and network effects continue to be more efficient than others. Nevertheless, their position may change quickly if the product loses quality or the company ceases to offer its products at competitive prices[114], or even if a new trend suddenly arrives on the scene.

It is not easy to predict how a merger could affect the dynamics of a market that is in a constant state of flux. For this reason, the OECD also discusses flexibility[115]. However, we do not believe that a solution requires a flexibility obligation merely for the EC and the NCAs, but rather for all the parties involved. Work in conjunction is required to attempt to foresee the development of the market in the medium – or long-term – and those in the best position to forecast the future in two, four, six, eight or ten years are often the parties operating in the market. As good as they may be, case-handlers do not have a greater insight into market development. Most of them, justifiably, do not have even the slightest idea how the market operates[116].

Perhaps flexibility[117] is required when weighing up the panorama of post-merger effects leading to a prohibition of the merger against the more positive scenario that the company believes will exist in the future and to accept that it may be correct. Should its market power (or prices) subsequently increase, or its supply decrease significantly, investments in R&D may be

111 *See* OECD, 2020: pp. 15, 17, 18 and 37.

112 *Ibid.,* p. 3.

113 *Ibid.,* p. 7.

114 *Ibid.,* p. 17.

115 *Ibid.,* p. 32.

116 Regarding the absence of full information by the regulator *see* Kwoka, *supra* n. 96, p. 8.

117 Including the flexibility to evaluate unforeseen events, such as the Covid-19 pandemic.

unexpectedly reduced or the business plan may not proceed as expected, then the undertaking may later resort to divestments adjusted to the new situation as discussed at the initial stages of the merger control proceedings[118] along with the payment of fines for breaching legitimate expectations. This would mean that companies would bear the burden of meeting the expectations offered during the merger control proceedings. They would have to *talk the talk and walk the walk*.

Moreover, according to this perspective, it makes sense for an undertaking to reject future risks of a different market development outcome, as it may certainly suffer the consequences at a later stage. Structural remedies or prohibitions would then be a stronger option. It is possible that this would be a better solution than imposing structural remedies as a general rule, and interpreting this as a strict and effective application of the merger-control system.

This solution might perhaps represent a better balance between the protection of healthy market competition, private initiative and the freedom of the parties to negotiate, as well as the duty of good administration of all competition authorities which would take into account the different scenarios and actions in accordance with the principle of proportionality.

Such solutions will undoubtedly require a new legal framework. However, as previously mentioned by the ECJ in the Illumina/Grail judgment, both Member States and the EC have the authority and the powers to amend the existing legal framework.

Moreover, the timing is right. Europe is ready for a new era of competition law. The Draghi Report and Ursula von der Leyen's Mission Letter have shown this determination. Now, the most important task will be finding the right way to implement the outlined goals.

We have shared some possible paths, but there are many other viable and perhaps even more suitable ones that might exist in order to achieve the desired results that we are all eager to see.

5. CONCLUSION

At the present time, it is obvious that there is a serious imbalance between the realities of dynamic markets – in particular, with digital platforms and tech industry – and the traditional analysis of mergers by the EC and NCAs.

118 For criticism of behavioural and late remedies in dynamic markets, *see* OECD, *supra* n. 111, pp. 32,33 and 37.

The EC's response was to broaden its toolkit with new theories of harm, paying closure scrutiny to digital markets, focusing special attention to non-price parameters of competition, as well as an attempt to boost its powers with the new interpretation of Article 22 EUMR[119]. Notwithstanding, this new interpretation of Article 22 was completely rejected by the ECJ, leaving the EC and the Member States with the task of devising viable alternatives.

The new President of the EC and the new Executive Vice-President already conveyed a public message on the new approach of competition policy. The Draghi Report serves as a beacon and a roadmap to tackle the problems already identified.

The time has come to delve into the specifics on how to implement the new approach to competition law in the EU. New legislation and guidelines will be required. There will be several admissible paths, and with this article we also aimed to provide our contribution.

But the critical point will be a need to address the challenges with the audacity required in the modern times. And at this stage, a least for us, audacity is also a synonym of greater flexibility. Just as also rightly emphasized by Viktoria Robertson, digital platforms are building even more comprehensive digital ecosystems, and the question arises whether merger control is flexible enough to meet the new anti-competitive threats that digital mergers bring with them[120]. That is indeed the crucial question.

The enforcement of competition law must be strict and unyielding whenever necessary. Non-applied, indecisive or formal competition law would be far worse than no competition law at all. Nevertheless, the intervention of the EC and NCAs must be well-informed, well-grounded and immune to the popular or opportunistic movements that arise from time to time, especially in times of crisis.

Given the rapid growth of the market and all the uncertainty about the future, what is required is greater flexibility and the ability to accept that

119 Other measures were also envisaged, such as the Digital Markets Act ("DMA"), as a way of intervening *ex-ante* in actions taken by gatekeepers. This legislation imposes supplementary obligations on gatekeepers when operating in the market and stricter control by the EC over the different steps it takes involving the internal market. As to mergers in which gatekeepers participate, Article 14 of the DMA makes it mandatory to notify the intention to acquire a company even when the mandatory thresholds for notification of the merger have not been reached. This is designed to address the lack of capacity to interfere in mergers which as a result have often escaped the EC's filter.

120 *See* Robertson, *supra* n. 61, p. 10.

premature intervention may sometimes be detrimental. Excessive intervention may also have a cost in the decrease of the consumer welfare.

Besides everything that has already been said, we should not overlook the fact that, in these markets, there are substantial investments and new businesses wishing to create something attractive and later sell it to the large established undertakings in the market. The dream of making millions by bounding onto the scene with an ingenious product is increasingly more common in the younger generations. Such dreams are also the creators of employment, wealth and consumer welfare. And this should be taken into account.

In light of this problem, this paper advances a pragmatic solution: to adapt the EU merger control so that it explicitly integrates dynamic competition and innovation-based efficiencies into its substantive test, and to recalibrate the choices of remedies accordingly. Rather than relying primarily on structural divestitures – often ill-suited to rapidly evolving digital environments – competition authorities should favour behavioural and innovation-preserving remedies to safeguard future contestability while allowing beneficial integrations to proceed. This approach promotes the objectives of EU competition law – innovation, consumer welfare, and market openness – in a way that reflects the reality of contemporary digital markets.

Assessing mergers without taking the current context into account would be a poor application of competition law. Of all the areas of law, competition law is possibly the one that should be the most readily adjustable to market conditions.

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