



Bundeskartellamt



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Merger control in the digital age – Challenges and development perspectives

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Background paper

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A. Particularities of mergers in the digital economy

In the past few years, the German and European legislators have created new rules for large companies active in the digital sector. Both Section 19a of the German Competition Act (GWB), which was introduced as part of the 10th amendment to the GWB, and the Digital Markets Act (DMA)¹, which is due to enter into force shortly at a European level, make it possible in this context to effectively terminate certain types of potentially abusive unilateral conduct by large digital corporations. However, special characteristics of mergers in the digital sector have so far not been the main focus of legislators² although both the 19th German Bundestag³ and also the currently governing coalition⁴ have already indicated that action is needed in this regard. In the literature and in various expert opinions it is noted that the particularities of mergers in the digital sector may make it necessary to critically reflect on the current legal situation and enforcement practice.

The observation that, in the past, large companies in the digital sector implemented numerous mergers of which only a small fraction was subject to merger control by a competition

¹ On the relationship between competition law and the DMA see *Bundeskartellamt (BKartA)*, Digital Markets Act: Perspectives in (inter)national competition law (https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2021/Working_Group_on_Competition_Law_2021.html).

² In the 9th amendment to the GWB the German legislator established another criterion for determining whether a merger is subject to merger control by introducing the transaction value threshold in Section 35(1a) GWB, which is particularly also aimed at mergers in the digital sector, see pp. 11 ff. below. The 10th amendment to the GWB brought various modifications, including the introduction of Section 39a GWB, which makes it possible for the Bundeskartellamt to oblige companies under certain conditions to notify every merger in one or several specific sectors of the economy. However, this provision is not primarily aimed at phenomena relating to the digital economy but focuses more generally on successive acquisition transactions particularly on regional markets (Government draft bill, Bundestag printed paper 19/23492, pp. 94 ff.; more open view taken e.g. by *Becker*, Fusionskontrolle unterhalb der Aufgreifschwelle, ZWeR 2020, pp. 365 ff. (387 f.)). The DMA does not provide for any modifications to the ECMR conditions either; in Article 14 it only sets out an obligation for gatekeepers to notify mergers to the COM irrespective of the ECMR criteria determining whether a merger is subject to merger control. The purpose of this merger notification is, among other things, to enable the Member States to request the COM to examine the concentration pursuant to Article 22 ECMR (see Article 14(5) DMA), for more information also see p. 17 below.

³ Recommended resolution and report by the Committee on Economic Affairs and Energy, Bundestag printed paper 19/25868, p. 10. ("The German Bundestag calls on the Federal Government [...] to make every endeavour at a European level to create possibilities to prohibit companies of paramount significance across markets from impeding innovation and competition by strategically acquiring competitors (so-called 'killer acquisitions'). (Translation provided by the Bundeskartellamt)

⁴ Coalition agreement between the German parties SPD, Bündnis 90/Die Grünen and FDP, 2021, p. 31 ("At a European level, we will make serious efforts to adjust merger control in order to stop strategic acquisitions of potential competitors stifling innovation (so-called killer acquisitions).") (Translation provided by the Bundeskartellamt)

authority serves as the main springboard for merger control considerations.⁵ Against this backdrop the concern is often expressed that mergers in the digital sector which are significant from a competition point of view are from the outset excluded from an assessment under national and European law due to the structure of the criteria determining whether a merger is subject to merger control.⁶ However, even if an assessment under merger control was carried out in the past, the proceedings were in most cases terminated by an unconditional clearance decision. In this context, doubts are expressed by some authors as to whether the traditional theories of harm adequately address the competition concerns associated with certain types of mergers in the digital sector and the conceivable efficiencies.⁷ In some cases, it is also considered necessary to amend the substantive examination standard.⁸

In preparation of the meeting of the Working Group on Competition Law, this background paper is intended to trace the outline of the discussion about mergers in the digital economy. For this purpose, the paper will first address the characteristics of digital business models and markets (I.) as well as the relevant challenges for merger control resulting from these characteristics (II.). The following sections will then deal with the implications these particularities have for the formal (B.) and substantive (C.) criteria for prohibiting a concentration in merger control proceedings. After drawing a conclusion (D.) the background paper will close with a compilation of selected open questions currently arising in the discussion about mergers in the digital sector (E.).

⁵ *Argentesi et al.*, Ex-post Assessment of Merger Control Decisions in Digital Markets, 2019, pp. 10 ff. (“most of this M&A activity occurs below the radar of competition authorities [...]”); *Bourreau/de Streel*, Big Tech Acquisitions, 2020, pp. 5 ff.

⁶ See, for example, *Bourreau/de Streel*, Big Tech Acquisitions, 2020, p. 5; *Podszun*, Empfiehlt sich eine stärkere Regulierung von Online-Plattformen und anderen Digitalunternehmen?, 2020, p. 66.

⁷ For example, *Argentesi et al.*, Ex-post Assessment of Merger Control Decisions in Digital Markets, 2019, p. 44 ff. (“There is a concern that merger policy has put too much weight on the risk of incorrect intervention (type I error) compared to incorrect clearance (type II error) when assessing mergers in the digital sector, leading to increased concentration in digital markets.”); *ACCC*, Digital Platform Services Inquiry, 2022, pp. 65 ff. (“There is a broad recognition from both competition agencies and governments that, given the critical role that large digital platforms and their growing ecosystems perform in the economy, acquisitions by these firms require a higher level of scrutiny.”); a more cautious view is expressed by *Cabral*, Merger policy in digital industries, Information Economics and Policy 2021, pp. 1 ff. (2) (“Tightening merger policy not only is a relatively less efficient approach but also one that has enormous costs in terms of innovation incentives.”).

⁸ For example, *Furman et al.*, Unlocking digital competition, 2019, pp. 99 ff.; see pp. 36 ff. below.

I. Characteristics of digital business models and markets

Digital business models and markets have a number of characteristic features.⁹ These features have various effects on the discussion about the challenges faced by and the development perspectives of merger control in the digital sector. For instance, the question may arise as to what extent traditional theories of harm are (still) adequate in light of these characteristics to evaluate a merger's effects on competition in the digital sector. The extent to which these characteristics can be compared to those of other markets so that a comparable competitive assessment may be justified can also be important.¹⁰ Identifying special characteristics can, not least, be relevant for the question of whether legislative changes to specifically adjust the legal framework exclusively to digital business models and markets are advisable.

First, digital business models are often characterised by large economies of scale. Providing the services to an additional user, for example, is usually associated with only minimal marginal costs for a digital company.¹¹ In addition to economies of scale, economies of scope also play an important role in many digital markets. Economies of scope exist if offering various products within a single company can be realised at lower costs than offering these products by different companies. Economies of scope can be a major reason for digital companies to implement diversification strategies.¹²

Moreover, many digital business models and markets are characterised by direct and indirect network effects.¹³ Direct network effects exist where a service's benefits to a user increase (positive network effects) or decrease (negative network effects) as the number of overall users grows. Positive network effects can make a service more attractive to new users, make switching to other services unattractive and tie users to the service in the sense of a 'lock-in effect'.¹⁴ Indirect network effects are characteristic of so-called multi-sided markets or

⁹ See, for example, the considerations by *Bourreau/de Streel*, Big Tech Acquisitions, 2020, pp. 5 ff.; *Podszun*, Empfiehlt sich eine stärkere Regulierung von Online-Plattformen und anderen Digitalunternehmen?, 2020, pp. 10 ff.; *OECD*, Roundtable on Conglomerate Effects of Mergers, 2020, pp. 23 ff.; *Parker/Petropoulos/van Alstyne*, Platform mergers and antitrust, Industrial and Corporate Change 2021, pp. 1 ff. (2).

¹⁰ *Cunningham/Ederer/Ma*, for example, have argued for the pharmaceutical industry that "incumbent firms" sometimes acquire innovative targets solely to discontinue the target's innovation projects and preempt future competition, so-called "killer acquisitions" (*Cunningham/Ederer/Ma*, Killer Acquisitions, Journal of Political Economy 2021, S. 649 ff.). Taking this a step further, the transferability of the findings to mergers in the digital sector is discussed in the literature (see the following section A.II).

¹¹ *Crémer et al.*, Competition policy for the digital era, 2019, p. 20.

¹² *Bourreau/de Streel*, Digital Conglomerates and EU Competition Policy, 2019, p. 9.

¹³ *Argentesi et al.*, Ex-post Assessment of Merger Control Decisions in Digital Markets, 2019, pp. 4 ff.; *Crémer et al.*, Competition policy for the digital era, 2019, pp. 20 ff.

¹⁴ *Crémer et al.*, Competition policy for the digital era, 2019, pp. 22 f. ("The benefits, for an incumbent platform, of network externalities are due to the difficulty for users to coordinate migration to a new

platforms. Platforms are companies which, as intermediaries, enable direct interaction between two or more user sides, between which indirect network effects exist.¹⁵ Indirect network effects exist, for example, where an increase in user numbers on one market side increases the service's value on the other market side (positive network effects) or where an increase in user numbers on one market side decreases the service's value on the other market side (negative network effects).¹⁶ Positive network effects may lead to market 'tipping' so that the scope of action enjoyed by the incumbent is no longer controlled by competition in the market but (only) by competition for the market.¹⁷ One characteristic feature of digital multi-sided markets moreover is that the offers are frequently provided to one market side at no monetary cost and financed through the offer provided to the other market side – such as offering advertisers opportunities for their adverts to be seen by their target audience.¹⁸

In the digital sector, economies of scale and network effects are often accompanied by other advantages of scale. The reason for this is that a service's increased popularity may involve, for example, an increased ability to better access data relevant to competition compared to other market players.¹⁹ The quality improvements made possible by way of data can then, in the sense of a feedback loop, lead to the service's popularity further increasing, thus making it possible to collect even more data.

In their entirety, these features of digital business models can also facilitate strategies allowing a company to create, strengthen or secure a so-called ecosystem. Such an ecosystem can be reflected in the technical connection between various products and services offered by a

platform. Indeed, even if the users would all be better off if they migrated en masse to a new platform, they would not necessarily have an individual incentive to move to the new platform – whether or not they chose to do so depends on their expectation that others will follow.”).

¹⁵ See, for example, *BKartA*, Working Paper – Market Power of Platforms and Networks, June 2016, p. 14.

¹⁶ *Argentesi et al.*, Ex-post Assessment of Merger Control Decisions in Digital Markets, 2019, p. 5.

¹⁷ *Argentesi et al.*, Ex-post Assessment of Merger Control Decisions in Digital Markets, 2019, p. 44 (“Network effects often make the structure of digital markets quite concentrated and barriers to entry rather high. [...] The main mechanism left to discipline incumbents is that of competition for the market, i.e. that potential and actual entry mitigate the ability of incumbents to exert market power. This makes potential competitors even more valuable than they usually are in traditional markets.”); *Crémer et al.*, Competition policy for the digital era, 2019, p. 25 (“[...] absent differentiation and multi-homing—the normal play of competition will lead to concentration. This does not imply that competition will not have a role to play to discipline platforms, but it will imply that it takes a different form, namely competition “for the market”, [...].”); *Schweitzer et al.*, Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen, 2018, p. 123 (“Entering a platform market dominated by a company enjoying strong positive network effects is usually only possible by entering niche markets first. However, from these niche markets competitors can in the long run gradually approach the core market of an established dominant company.”). (Translation provided by the Bundeskartellamt)

¹⁸ In some of the economic literature this is also referred to as “markets for attention”, see *Argentesi et al.*, Ex-post Assessment of Merger Control Decisions in Digital Markets, 2019, pp. 5 ff.

¹⁹ *OECD*, Roundtable on Conglomerate Effects of Mergers, 2020, p. 24.

company.²⁰ This may result in complementarities or synergies; an example of this on the supply side is the use of one input factor for various products.²¹ Data in particular can constitute such an input factor. Privileged access to data which cannot be easily replicated – gained, for example, based on the positive network effects mentioned above – can result in a greater potential for a company to use data for quality improvements across various connected services by, for example, personalising offers across services. The technical connection between various products or services can also facilitate strategies which increase the switching costs for users. If products or services offered by a company can only be used together or if it is at least better to use them together with other products or services in the ecosystem, the use of individual products or services can already result in (another) lock-in effect, which at least influences a user's future decisions in the sense of path dependency.²²

Lastly, innovations play a prominent role in digital business models and digital markets and contribute considerably to the welfare-enhancing effects of the digital economy.²³ A special feature of digital products and services thus also is their potential for remarkable adaptability over time.²⁴ However, companies can also have a strategic interest in impeding innovative third-party business models, products and services if, for example, they compete with the company's established offers or could potentially turn into competitors.²⁵ In addition, companies active in markets which have already 'tipped' may possibly have only a limited incentive to invest in research and development.²⁶

²⁰ See, for example, *Bourreau/de Streel*, Digital Conglomerates and EU Competition Policy, 2019, p. 12, who hold, however, that appropriate synergies enjoyed by the consumer side in particular are required for the term ecosystem to be used within the meaning described there; *Crémer et al.*, Competition policy for the digital era, 2019, pp. 33 ff. ("Ecosystems are an ensemble of services, some complementary, connected to another through private APIs which are APIs accessible only to services from the same ecosystem.").

²¹ *Bourreau/de Streel*, Digital Conglomerates and EU Competition Policy, 2019, p. 11.

²² *Podszun*, Empfiehlt sich eine stärkere Regulierung von Online-Plattformen und anderen Digitalunternehmen?, 2020, p. 18.

²³ *Crémer et al.*, Competition policy for the digital era, 2019, p. 35 ("competition between platforms and ecosystems takes place in a spectacular way, through innovation").

²⁴ *Limarzi/Philips*, "Killer acquisitions," Big Tech, and Section 2, CPI Antitrust Chronicle Spring 2020, p. 9 ("For example, Instagram was transformed from a photo-sharing app into a social media platform. Uber used to be a luxury car-hire service. And Android was a little-known software company before Google transformed it into the world's most popular mobile ecosystem.").

²⁵ *CMA*, A new pro-competition regime for digital markets, 2020, p. 19.

²⁶ *Fidelis*, Data-driven mergers, RDC 2017, pp. 189 ff. (196) ("This is because, by backward induction, the smaller firm will choose not to invest in innovation since it knows that the dominant firm will be able to match any investment at a lower marginal cost. Knowing this, the dominant's best response is also not to invest. Thus, market tipping cannot only raise barriers to entry, but it can also harm consumers due to the resulting underprovision of innovation.").

II. Challenges for merger control in the digital economy

The past ten years have seen a number of acquisitions by large digital corporations.²⁷ The ‘Big Five’ (Alphabet, Amazon, Apple, Meta and Microsoft) together account for more than 400 mergers implemented between 2009 and 2019.²⁸ Most of these acquisitions were not assessed under competition law due to the target companies’ low turnover; none of the few merger projects that were assessed in this period was prohibited.²⁹ Nevertheless, many of these mergers involved target companies which could have developed into competitors to the acquiring company (e.g. Facebook/Instagram), contributed to strengthening the acquirer’s market position in another market (e.g. Google/DoubleClick), or the data-driven business model of which contributed to strengthening the acquirer’s market position in several markets at the same time (e.g. Google/YouTube).³⁰ This is why “underenforcement” is often mentioned in the literature when it comes to mergers in the digital economy.³¹ In particular, some authors hold that a ‘positive prior’ exists in the assessment of conglomerate merger projects which are usually not considered to raise competition concerns.³²

One aspect of the debate focuses on acquisitions of small, fast-growing start-ups by large digital corporations where the target company could be a potential competitor to the acquiring company but at the time of the acquisition notable horizontal overlaps are not yet evident.³³ In this case, the merger is to be classified as a vertical or conglomerate merger according to the traditional line of thinking, which constrains the theories of harm to

²⁷ *Cabral et al.*, The EU Digital Markets Act, Publications Office of the European Union, 2021, p. 25; *Bourreau/de Streel*, Big Tech Acquisitions, 2020, p. 5.; *Motta/Peitz*, Big Tech Mergers, Discussion Paper Series CRC TR 224, May 2020, p. 1.

²⁸ *Furman et al.*, Unlocking digital competition, 2019, p. 12 (“Over the last 10 years the 5 largest firms have made over 400 acquisitions globally. None has been blocked and very few have had conditions attached to approval, in the UK or elsewhere, or even been scrutinised by competition authorities.”).

²⁹ *Bourreau/de Streel*, Big Tech Acquisitions, 2020, p. 5; *Cabral et al.*, The EU Digital Markets Act, Publications Office of the European Union, 2021, p. 27; *Crémer et al.*, Competition policy for the digital era, 2019, p. 110; *Motta/Peitz*, Big Tech Mergers, Discussion Paper Series CRC TR 224, May 2020, p. 1. The British CMA has meanwhile taken up and prohibited the Meta/Giphy merger. The parties appealed this decision and the Competition Appeal Tribunal remitted the case to the CMA in July 2022 (<https://www.gov.uk/cma-cases/facebook-inc-giphy-inc-merger-inquiry>).

³⁰ *Furman et al.*, Unlocking digital competition, 2019, p. 11.

³¹ *Argentesi et al.*, Ex-post Assessment of Merger Control Decisions in Digital Markets, 2019, p. 44; *Rizzo*, Digital Mergers, JECLP 2021, pp. 4 ff. (9 f.); *Witt*, Who’s Afraid of Conglomerate Mergers?, The Antitrust Bulletin, 2022, pp. 208 ff.

³² *Bourreau/de Streel*, Digital Conglomerates and EU Competition Policy, 2019, pp. 13 f.; *van den Boom/Samranchit*, Digital Ecosystem Mergers in Big Tech – A Theory of Long-Run Harm with Applications, Journal of European Competition Law & Practice, 2022, pp. 365 ff.; on the other hand, *Witt* states that it is notable how many assessments of big tech acquisitions included conglomerate theories of harm (*Witt*, Who’s Afraid of Conglomerate Mergers?, The Antitrust Bulletin, 2022, pp. 208 ff. (221)).

³³ *Crémer et al.*, Competition policy for the digital era, 2019, pp. 110 f.; *Motta/Peitz*, Big Tech Mergers, Discussion Paper Series CRC TR 224, May 2020, p. 2.

foreclosure effects and coordinated effects and makes it difficult to prove the existence of effects restricting competition.³⁴

In this context, the phenomenon of so-called ‘killer acquisitions’, which was first described by *Cunningham/Ederer/Ma* for the pharmaceutical industry, is to be mentioned as another challenge. Killer acquisitions are takeovers carried out by the acquiring company with the aim of excluding the innovative products of the (usually young) target company from the market or discontinuing the target company’s innovative efforts. This is therefore not a neutral definition but a theory of harm.³⁵ The acquirer’s incentive to discontinue the target company’s innovative efforts after the takeover lies in avoiding rent cannibalisation, which could result from the replacement of its previous products by the target company’s innovative products (‘replacement effect’).³⁶ However, *Crémer et al.* argue that most tech acquisitions are not killer acquisitions since the target company’s products or projects are integrated into the acquirer’s ecosystem. In their view, this could result in efficiency gains, making it ever more complex to formulate a theory of harm.³⁷ ‘Killer acquisitions’ therefore have to be distinguished from so-called “nascent potential competitor” theories of harm. The concern here is that the acquiring company does not intend to discontinue the target company’s innovative efforts or take its innovative products off the market, but wants to control them itself, resulting in the fact that the competitive pressure exerted on the acquirer by the target company no longer exists.³⁸ Inversely, acquiring innovative companies can also be linked to the acquirer’s aim of reducing its own innovative efforts in the relevant target company’s field of innovation; this is sometimes referred to as “reverse killer acquisition”.³⁹

If a company expands its ecosystem by adding another product or service (be it through internal or external growth), this may also be linked to a strategy to transfer the position reached in one market through network effects and economies of scale to another market and to exclude competitors (so-called ‘envelopment’).⁴⁰ The reason for this is that, for one

³⁴ *Crémer et al.*, Competition policy for the digital era, 2019, pp. 112 ff.

³⁵ *Cunningham/Ederer/Ma*, Killer Acquisitions, *Journal of Political Economy* 2021, pp. 649 ff.; *Cabral et al.*, The EU Digital Markets Act, Publications Office of the European Union, 2021, p. 24; *OECD*, Start-ups, Killer Acquisitions and Merger Control, 2020, p. 9.

³⁶ *Argentesi et al.*, Ex-post Assessment of Merger Control Decisions in Digital Markets, 2019, p. 7. For more information on the replacement effect also see *BKartA*, Innovations – Challenges for competition law practice, 2017, pp. 11 ff.

³⁷ *Crémer et al.*, Competition policy for the digital era, 2019, pp. 116 f.

³⁸ *OECD*, Start-ups, Killer Acquisitions and Merger Control, 2020, p. 10.

³⁹ *Caffarra/Crawford/Valletti*, “How Tech Rolls”: Potential Competition and “Reverse” Killer Acquisitions, *CPI Antitrust Chronicle*, May 2020, pp. 13 ff.

⁴⁰ *Bourreau/de Streel*, Digital Conglomerates and EU Competition Policy, 2019, p. 16; *OECD*, Roundtable on Conglomerate Effects of Mergers, 2020, pp. 26 ff.

thing, overlaps in user groups between the two markets can lead to the company directly profiting from the strong network effects also in the new market. For another, economies of scope, resulting from the use of data already collected on one market as a shared input factor, for example, can also strengthen the position in the other market (or even in the wider ecosystem). The adverse effects on competition mentioned above can potentially be mitigated by the users' possibility to use similar products or services in parallel (so-called 'multi-homing').⁴¹ If the switching costs for users are low, this makes it possible to limit the effects mentioned above in the individual case.

In general, digital companies dominating the market have incentives to fend off attacks on their position of power by way of imitation or acquisition and in this way reduce the level of contestability in the markets in which they are active. This may result in the fact that young, innovative companies no longer try to enter markets in the vicinity of the dominant digital companies or no longer find any investors for this. In the literature this is described as the creation of a 'kill zone'.⁴² Some authors hold that this may result in shifting innovation incentives for young companies away from radical innovations towards innovations which complement those of large digital corporations.⁴³

The problem of uncertainty in forecasting the effects of the concentration on competition poses a particular challenge in assessing merger projects in the digital economy. The forecast not only pertains to the development of the competitive situation in the event of the merger but also to a plausible 'counterfactual' adequately taking into account the market's dynamics (i.e. forecasting the future development of the competitive situation without the merger). Especially if a young target company is not yet a (relevant) competitor to the acquirer at the time of the acquisition or if there are horizontal overlaps only in areas in which the acquiring company itself does not yet hold a strong market position, it can be difficult to forecast the effects the concentration may have on competition.⁴⁴ In addition, many characteristics of

⁴¹ *Argentesi et al.*, Ex-post Assessment of Merger Control Decisions in Digital Markets, 2019, p. 5.

⁴² *Bourreau/de Streel*, Digital Conglomerates and EU Competition Policy, 2019, p. 21; *Rizzo*, Digital Mergers, JECLP 2021, pp. 4 ff. (6); *Schallbruch et al.*, Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft, 2019, p. 65.

⁴³ *Schallbruch et al.*, Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft, 2019, p. 65. Restricting this view, *Motta/Peitz* point out that it is the very prospect of being acquired by a dominant company which creates incentives for young companies to enter the markets in which the dominant player intends to protect its market position through acquisitions. Consequently, they hold that it is only possible to explain the existence of 'kill zones' by other exclusionary strategies reducing the value of a start-up (*Motta/Peitz*, Big Tech Mergers, Discussion Paper Series CRC TR 224, May 2020, p. 20).

⁴⁴ *Argentesi et al.*, Ex-post Assessment of Merger Control Decisions in Digital Markets, 2019, p. 44; *OECD*, Start-ups, Killer Acquisitions and Merger Control, 2020, pp. 9 f., 21; *Schallbruch et al.*, Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft, 2019, p. 69; *Shapiro*, Protecting Competition in the

digital markets are factors increasing the uncertainty in forecasting the effects of a concentration. These include network effects and the multi-sidedness of markets, data-driven business models and the fact that the markets are highly dynamic due to often disruptive innovations.⁴⁵ In particular, if the harm to competition expected to be caused by a merger is based on the loss of potential competition, the uncertainty in forecasting the merger's effects makes it more difficult to prove such harm with sufficient certainty, making a prohibition likely to fail due to the probability standard.⁴⁶

Meta/Kustomer merger

In early 2021 Meta notified the Austrian competition authority Bundeswettbewerbsbehörde (BWB) that it intended to acquire sole control of the company Kustomer. Meta essentially offers various social media services and online advertising products, in particular (via) the social network Facebook, the service Instagram and the communication services Facebook Messenger and WhatsApp. Meta also offers third parties application programming interfaces (APIs) for these communication services, which make it possible to integrate the services into enterprise software. Kustomer offers a cloud-based service for customer relationship management purposes, which companies can use, for example, to manage customer data and contacts and which in particular bundles the various communication channels corporate clients use to communicate with their customers. These also include the communication channels operated by Meta, which Kustomer accesses via the APIs made available by Meta.

The BWB requested the proceeding to be referred to the EU Commission (COM) pursuant to Article 22(1) ECMR. Germany did not join the request for referral within the period under Article 22(2) sentence 2 ECMR because according to the general practice a referral requires a merger to be subject to notification under German law, which still had to be clarified. The COM granted the request and initiated an in-depth investigation. In the investigation the COM found, in particular, that following the merger Meta would have possibilities and incentives to exclude third parties from accessing Kustomer's business APIs. With regard to the offer of online advertising services, the COM found that Meta's competitors had access to data which were similar to the data additionally made available to Meta by the acquisition of Kustomer. As a result, the COM cleared the acquisition in February 2022 subject to Meta's binding

American Economy: Merger Control, Tech Titans, Labor Markets, Journal of Economic Perspectives 2019, pp. 69 ff. (73).

⁴⁵ *Bourreau/de Streel*, Big Tech Acquisitions, 2020, p. 5; *Furman et al.*, Unlocking digital competition, 2019, p. 95.

⁴⁶ *Crémer et al.*, Competition policy for the digital era, 2019, p. 112; *Furman et al.*, Unlocking digital competition, 2019, p. 98.

commitment that it would ensure non-discriminatory access to all business APIs for ten years.⁴⁷

Meanwhile, the Bundeskartellamt concluded that the merger project had to be notified in Germany based on the fact that the transaction value threshold provided for in the notification requirements was reached⁴⁸ and initiated the first phase of a merger control proceeding.⁴⁹ In the proceeding, the Bundeskartellamt particularly had to assess whether the acquisition was expected to strengthen the ecosystem operated by Meta. According to the Bundeskartellamt's assessment, Meta was likely to gain improved access to the customer data processed by Kustomer. In the authority's view, Meta could use this data advantage for other services in the ecosystem, especially for online advertising. The Bundeskartellamt moreover held that the acquisition could serve the purpose of developing other services by integrating Kustomer's product functionalities into such services, especially by integrating such functionalities in the offer "Shops", which allows retailers to offer their own products in the context of a virtual shop. In this regard, it could be a competitive advantage if Meta were able to offer clients the option of maintaining end customer relations via Kustomer products. However, it was not possible to establish with the necessary level of probability that the services and capabilities associated with Kustomer were of sufficient significance for the ecosystem to develop in such a way to warrant initiating an in-depth investigation.

B. Implications for the formal prohibition criteria

Limiting the scope of application of merger control rules in formal terms based on certain size-related criteria provides a legally secure way for companies and competition authorities to save time and resources associated with an official assessment of also those cases which in terms of the economy as a whole are negligible from the outset.⁵⁰ However, this also entails the risk that in certain situations projects which would have to be assessed from a substantive point of view cannot be taken up by the competition authorities for purely formal reasons. Against this background, the issue of whether the turnover thresholds are appropriate for mergers in the digital economy is addressed in the literature and, especially with regard to

⁴⁷ Case M.10262 (https://ec.europa.eu/commission/presscorner/detail/en/IP_22_652); the full decision had not yet been published at the time this paper was completed.

⁴⁸ Meta has appealed this decision to the Düsseldorf Higher Regional Court but the decision on the appeal is still outstanding. The Bundeskartellamt's decision has therefore not yet become final.

⁴⁹ More detailed information on Case B6-21/22 is provided in the corresponding case summary (<https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Fusionskontrolle/2022/B6-21-22.html>).

⁵⁰ *Kling/Thomas-Thomas*, Kartellrecht, 2016, § 22 para. 61 on the purpose of reducing the workload for authorities.

European law, the introduction of transaction value and market share thresholds is discussed (I.). According to the COM's recent practice, assessing such mergers should also be possible on the basis of a referral pursuant to Article 22 ECMR (II.). In addition, it has also been suggested that (further) information and notification obligations be introduced specifically for cases in which large digital corporations are involved in the mergers (III.). Lastly, establishing an ex-post possibility for competition authorities to take up cases alongside the ex-ante assessment of merger projects enshrined in German and European law is also being discussed (IV.). The overall picture will show that especially the suggestions concerning the introduction of specific information and notification obligations for large digital companies based, for example, on establishing a company's paramount significance across markets within the meaning of Section 19a(1) GWB, appear promising.

I. Discussion about quantitative thresholds

The appropriateness of the turnover thresholds set out in Section 35(1) GWB and Article 1(2), (3) ECMR is considered problematic in the digital sector especially with regard to mergers involving large digital corporations. The reason for this is that such corporations often acquire young companies⁵¹ which are still focusing on rapid growth, especially of their user base, in order to benefit from network effects or even the market tipping in their favour.⁵² Maximising their turnover or profit, in contrast, is often not the focus of the target company.⁵³ At the same time, however, this means that, at least in this early phase, the target company's significance for competition does not necessarily correlate with its turnover.⁵⁴ A frequently cited example of such a scenario is the Facebook/WhatsApp merger implemented in 2014, which was not

⁵¹ See, for example, *Argentesi et al.*, Ex-post Assessment of Merger Control Decisions in Digital Markets, 2019, p. ii ("We have also analysed the age of the targets at the time of the acquisition and found that targets are four-year-old or younger in nearly 60% of cases. More specifically, the median age of Amazon's targets is 6.5 years; that of Facebook's targets is 2.5 years; and that of Google's targets is 4 years."); *FTC*, Non-HSR Reported Acquisitions by Select Technology Platforms, 2021, pp. 23 ff. ("[...] depending on the approach used, between 39.3% to 47.9% of transactions were for target entities that were less than five years old at the time of their acquisition. This percentage range could also be different (i.e., fall outside of this range), as the target entities in 13.4% of the transactions did not have founding dates located in any of the three databases.").

⁵² *Bourreau/de Streel*, Big Tech Acquisitions, 2020, p. 15.

⁵³ *Bourreau/de Streel*, Big Tech Acquisitions, 2020, p. 15.

⁵⁴ *Crémer et al.*, Competition policy for the digital era, 2019, p. 111 ("This runs counter to the assumption underlying the jurisdictional test of the EUMR that the "Community dimension" of a merger, i.e. its potential competitive significance for the internal market, is roughly related to the turnover of both the acquirer and the target"); *CMA*, A new pro-competition regime for digital markets, 2020, p. 57 ("There is a risk, however, that [the turnover test] fails to capture many transactions entered into by the most powerful digital firms, which often involve the acquisition of nascent, potential competitors or firms whose early stage business model is to initially offer 'free' services to consumers, which may be generating little or no revenue in the UK.").

captured by either the German or European turnover thresholds at the time due to WhatsApp's low turnover.⁵⁵

Against this background, some authors are considering lowering the turnover thresholds for certain types of transactions, but most of the considerations are in the end dismissed as inexpedient.⁵⁶ The reason for this is that lowering the threshold, first of all, results in a considerable workload for companies and authorities due to the increased number of mergers that have to be assessed⁵⁷ without, however, at the same time also solving the fundamental problem already mentioned, namely the issue of the turnover possibly failing to adequately reflect the competitive significance of a merger project.⁵⁸

In Germany and Austria the respective legislators have introduced a subsidiary size-related criterion by providing for a transaction value threshold (Section 35(1a) GWB and Section 9(4) KartG, respectively) in order to be able to identify competitively significant acquisitions of young companies, especially in the digital sector.⁵⁹ In this context, the value of the consideration is intended to function as a suitable indicator of the competitive potential of a company which still generates low turnover.⁶⁰ Unlike the turnover threshold, the transaction value threshold does not require the target company to reach certain domestic turnover values; instead, in the light of the effects doctrine under international law, the transaction value threshold requires the target company's domestic activities to be substantial.

⁵⁵ The merger could, however, be assessed by the COM based on a referral pursuant to Article 4 ECMR and was ultimately cleared (decision of 3 October 2014, case no M.7217).

⁵⁶ *Apel/Polley*, "Gap cases" in der formellen Fusionskontrolle der FKVO?, ZWeR 2021, pp. 273 ff. (306); *Levy/Mostyn/Buzata*, Reforming EU merger control to capture 'killer acquisitions', Competition Law Journal 2020, pp. 51 ff. (57f.); *Holmström et al.*, Killer Acquisitions? The Debate on Merger Control for Digital Markets, 2019 (<https://dx.doi.org/10.2139/ssrn.3465454>), pp. 12 f.

⁵⁷ *Levy/Mostyn/Buzata*, Reforming EU merger control to capture 'killer acquisitions', Competition Law Journal 2020, pp. 51 ff. (58).

⁵⁸ *Apel/Polley*, "Gap cases" in der formellen Fusionskontrolle der FKVO?, ZWeR 2021, pp. 273 ff. (306) ("Lowering the turnover thresholds not only seems ill-suited to capture formal gap cases. It would most likely not meet the approval of all Member States either.") (Translation provided by the Bundeskartellamt); *Bourreau/de Streel*, Digital Conglomerates and EU Competition Policy, 2019, p. 32 ("A notification threshold based on the turnover is not sufficient to capture some potentially harmful killer acquisitions"); *Crémer et al.*, Competition policy for the digital era, 2019, p. 113 ("[...] turnover-based thresholds do not appear to be a good proxy of the competitive significance of such transactions").

⁵⁹ In this regard also see *BKartA/BWB*, Guidelines on Transaction Value Thresholds for Merger Projects Subject to Notification, 2022.

⁶⁰ Bundestag printed paper 18/10207, p. 72.

In the literature, there are views both affirming⁶¹ and negating⁶² the appropriateness of transaction value thresholds. It is pointed out, for example, that introducing a transaction value threshold, e.g. in the ECMR, warrants the additional examination work for companies only if this also leads to “noticeable improvements in protecting competition” (translation provided by the Bundeskartellamt).⁶³ While the transaction value is generally considered a suitable indicator,⁶⁴ it is also noted that a high transaction value does not necessarily have to mean that a merger project raises competition concerns.⁶⁵ Furthermore, the practical application of the requirement that a company’s domestic activity has to be substantial and the objective determination of the transaction value in the individual case are considered problematic.⁶⁶

Another quantitative threshold that has been suggested in some of the literature is the introduction of a market share threshold along the lines of the one provided for under British law, for example.⁶⁷ On the one hand, introducing such a threshold could be supported by the

⁶¹ *Argentesi et al.*, Ex-post Assessment of Merger Control Decisions in Digital Markets, 2019, p. 45; *Bourreau/de Streel*, Big Tech Acquisitions, 2020, p. 16; for British law *CMA*, A new pro-competition regime for digital markets, 2020, p. 60; *Motta/Peitz*, Big Tech Mergers, Discussion Paper Series CRC TR 224, May 2020, p. 34. (“For this purpose, notification thresholds based on the acquisition price seem to us a useful complementary screening device”); *Podszun*, Empfiehlt sich eine stärkere Regulierung von Online-Plattformen und anderen Digitalunternehmen?, 2020, p. 83.

⁶² *Apel/Polley*, “Gap cases” in der formellen Fusionskontrolle der FKVO?, ZWeR 2021, pp. 273 ff. (308 f.) (“at a European level [...] not opportune”) (Translation provided by the Bundeskartellamt); *Crémer et al.*, Competition policy for the digital era, 2019, pp. 115 f. (“Only if major gaps arise should the EUMR be amended.”); *Schallbruch et al.*, Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft, 2019, p. 67 (“At present, it is not clear what a system of thresholds for taking up cases could look like to adequately resolve the associated conflicting goals. [...] In the view of the Commission on Competition Law 4.0, a reform of the thresholds for taking up cases as provided for under the ECMR is therefore not necessary at present.”) (Translation provided by the Bundeskartellamt); *Levy/Mostyn/Buzata*, Reforming EU merger control to capture ‘killer acquisitions’, Competition Law Journal 2020, pp. 51 ff. (59); *Turgo*, Killer Acquisitions in Digital Markets, CoRe 2021, pp. 112 ff. (118).

⁶³ *Schallbruch et al.*, Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft, 2019, p. 67.

⁶⁴ *Argentesi et al.*, Ex-post Assessment of Merger Control Decisions in Digital Markets, 2019, p. 45 (“[...] when particularly high, the value of the transaction may justify a more in-depth analysis of the merger.”).

⁶⁵ *Holmström et al.*, Killer Acquisitions? The Debate on Merger Control for Digital Markets (<https://dx.doi.org/10.2139/ssrn.3465454>), p. 15 (“In the case of a ‘killer acquisition’ a high transaction value follows from the desire to preserve monopoly rents and to eliminate a key competitor. However, a high transaction value can also follow from synergy effects and complementarities between acquirer’s and target’s products, assets, human capital, or intellectual property – this may or may not be a ‘killer acquisition’”). In the same vein also *COM*, Staff Working Document – Evaluation of procedural and jurisdictional aspects of EU merger control, 26 March 2021 (https://ec.europa.eu/competition/consultations/2021_merger_control/SWD_findings_of_evaluation.pdf), para. 266.

⁶⁶ *Apel/Polley*, “Gap cases” in der formellen Fusionskontrolle der FKVO?, ZWeR 2021, pp. 273 ff. (308); *Levy/Mostyn/Buzata*, Reforming EU merger control to capture ‘killer acquisitions’, Competition Law Journal 2020, pp. 51 ff. (59); *Turgo*, Killer Acquisitions in Digital Markets, CoRe 2021, pp. 112 ff. (118).

⁶⁷ *Apel/Polley*, “Gap cases” in der formellen Fusionskontrolle der FKVO?, ZWeR 2021, pp. 273 ff. (307).

fact that in an ex-post assessment of various “high-value non-horizontal digital mergers” the CMA reached the conclusion that it could have taken up all of these transactions based on the market share threshold.⁶⁸ At the same time, however, the CMA also notes that the market share threshold may fail to adequately capture non-horizontal merger projects.⁶⁹ In the literature it is also pointed out that such a threshold would reduce legal certainty because, similar to the minor market threshold under German law which also used to be one of the criteria for taking up a merger, questions regarding the market definition would then have to be clarified already when assessing the obligation to notify a merger.⁷⁰

II. Referral under Article 22 ECMR

Article 22 ECMR allows the Member States to refer any concentration without a Community dimension within the meaning of the ECMR to the COM for examination if the merger affects trade between Member States and threatens to significantly affect competition within the territory of the Member State making the request. If the COM shares this view, it may examine the merger in accordance with the ECMR, and the national legislation on merger control of the Member States having made or joined the request no longer applies (Article 22(3) subparagraph 3 ECMR). However, in all other Member States national law remains fully applicable.⁷¹

Originally, Article 22 ECMR was intended to offer Member States without national regimes for merger control the possibility to have cases examined by the COM regardless of the thresholds.⁷² However, at some point almost all Member States had implemented national regimes for merger control and against this background the COM developed a practice of “discouraging referral requests [...] from Member States that did not have original jurisdiction over the transaction” since it was assumed that in such cases the transactions “were not

⁶⁸ *Furman et al.*, Unlocking digital competition, 2019, p. 94 (“At the Panel’s request, the CMA retrospectively considered potential jurisdiction for a number of historic high-value non-horizontal digital mergers. In each case, the CMA assured the Panel that it could have asserted jurisdiction through the share of supply test, which is characterised by a considerable degree of flexibility in practice. Instead, it chose not to call in these mergers on the basis that they were not, at that time, considered to raise potential concerns. On this basis, there is not currently a strong case for any legislative change to the CMA’s jurisdiction, but the evidence does suggest the CMA must make digital mergers a higher priority.”).

⁶⁹ *CMA*, A new pro-competition regime for digital markets, 2020, p. 57 (“fails to capture many transactions [...], which often involve moving into adjacent markets, because it cannot capture mergers where the relationship between the merging parties is purely vertical in nature”).

⁷⁰ See *Becker*, Fusionskontrolle unterhalb der Aufgreifschwelle, ZWeR 2020, pp. 365 ff. (390), with regard to Section 39a GWB, however.

⁷¹ See *MüKo-Schild*, Wettbewerbsrecht, 2020, Article 22 ECMR paras. 74, 78; consequently, a decision taken by the COM on the merger is, de jure, not binding; however, in the case of transnational markets, the decision may actually also have an effect on Member States which have not referred the case.

⁷² *MüKo-Schild*, Wettbewerbsrecht, 2020, Art. 22 FKVO paras. 2 ff.

generally likely to have a significant impact on the internal market”.⁷³ The COM’s statements in its guidance published on 31 March 2021 mark a shift away from this practice. According to the COM’s considerations, it is the digital economy in particular where mergers may involve a company which generates little turnover.⁷⁴ In the past, this has led to the fact that a number of transactions relevant to competition have escaped review by both the COM and the Member States.⁷⁵ Against this background, the COM intends, in the future and in certain circumstances, to accept referrals even in cases where the referring Member State does not have initial jurisdiction over the case based on national law.⁷⁶

Even before the changes in the COM’s practice, some authors had already argued that national jurisdiction was not a necessary condition for a referral, especially according to the wording of Article 22 ECMR.⁷⁷ However, some authors oppose this view arguing that the wording of Article 22(3) ECMR implicitly requires that the Member State must have had national jurisdiction prior to the referral since this provision provides that such national rules are (no longer) applicable after the referral.⁷⁸ In the light of the principle of subsidiarity, it is also argued that, in the absence of national jurisdiction over merger control, a referral request should not be able to allow the competition authorities to undermine the national legislative decision against having the merger project examined under merger control rules by unilaterally establishing the COM’s primary jurisdiction.⁷⁹ In the authors’ view, the COM’s changed practice is also not an appropriate solution for the problems associated with mergers in the digital sector. They hold that, for one thing, the COM can take a decision after a referral only for those Member States which supported the referral.⁸⁰ And, for another, the provision results in significant legal uncertainty since, in their view, companies can no longer tell based

⁷³ COM, Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, 31 March 2021, para. 8.

⁷⁴ COM, Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, 31 March 2021, para. 9.

⁷⁵ COM, Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, 31 March 2021, para. 10.

⁷⁶ COM, Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, 31 March 2021, para. 11.

⁷⁷ See *Immenga/Mestmäcker-Körber*, Wettbewerbsrecht, 2020, Art. 22 FKVO para. 15 with further references.

⁷⁸ *Bechtold/Bosch/Brinker*, EU-Kartellrecht, 2014, Art. 22 FKVO para. 11; *Schmidt/Simon*, Die fusionskontrollrechtliche Zuständigkeitsverweisung gemäß Art. 22 FKVO, WuW 2011, pp. 1056 ff. (1060); *Wiedemann-Wagemann*, Handbuch des Kartellrechts, 2020, § 17 para. 163.

⁷⁹ *Schmidt/Simon*, Die fusionskontrollrechtliche Zuständigkeitsverweisung gemäß Art. 22 FKVO, WuW 2011, pp. 1056 ff. (1060); different view held by *MüKo-Schild*, Wettbewerbsrecht, 2020, Art. 22 FKVO para. 31.

⁸⁰ *Apel/Polley*, “Gap cases” in der formellen Fusionskontrolle der FKVO?, ZWeR 2021, pp. 273 ff. (296).

on clear criteria whether a transaction is subject to merger control, and the COM's authority could arise even after the transaction has been implemented.⁸¹

In July 2022, the European General Court ruled that the essential points of the COM's changed practice were permissible.⁸² The court in particular deemed it unnecessary for the referring authority to have jurisdiction under national law in order to submit a request for referral.⁸³ In the court's view, this was already suggested by the unrestrictive wording of the provision.⁸⁴ The fact that the referral mechanism was historically to be used for cases with regard to which no national merger control system existed, does, in the court's view, not preclude the provision's application to cases with regard to which national merger control rules exist.⁸⁵ The reason for this is that the ECMR's objective is to permit effective control of all concentrations with significant effects on the structure of competition in the EU.⁸⁶ The court consequently held that the referral mechanism, which constitutes a "corrective mechanism", was part of the ECMR's objective since it confers on the COM the flexibility necessary in cases in which a transaction does not exceed the turnover thresholds.⁸⁷

III. Introduction of an obligation to inform competition authorities about concentrations to enable them to review a case or introduction of an extended obligation to notify concentrations

An obligation to inform the competition authorities about all mergers intended by certain large digital companies is being discussed in order to enable the authorities to gain knowledge of concentrations which fall below the threshold values and, if necessary, review these under merger control rules. This could be followed by a temporary option for competition authorities to take up a case.

At the EU level, a corresponding system is established to a certain extent⁸⁸ by Article 14 DMA in conjunction with the COM's amended practice regarding Article 22 ECMR. Under Article 14(1) DMA, companies which have been designated as gatekeepers are obliged, among other requirements, to inform the COM of any intended or completed concentrations within the

⁸¹ *Apel/Polley*, "Gap cases" in der formellen Fusionskontrolle der FKVO?, ZWeR 2021, pp. 273 ff. (297 ff.); *Turgo*, Killer Acquisitions in Digital Markets, CoRe 2021, pp. 112 ff. (119).

⁸² *EGC*, Illumina vs COM, decision of 13 July 22, Case T-227/21.

⁸³ *EGC*, Illumina vs COM, decision of 13 July 22, Case T-227/21, paras. 85 ff.

⁸⁴ *EGC*, Illumina vs COM, decision of 13 July 22, Case T-227/21, para. 94.

⁸⁵ *EGC*, Illumina vs COM, decision of 13 July 22, Case T-227/21, paras. 96 ff.

⁸⁶ *EGC*, Illumina vs COM, decision of 13 July 22, Case T-227/21, para. 140.

⁸⁷ *EGC*, Illumina vs COM, decision of 13 July 22, Case T-227/21, paras. 141 ff.

⁸⁸ In deviation from the proposals in the literature, a referral by a Member State is still required, i.e. the COM cannot have primary competence immediately after the notification.

meaning of the ECMR, irrespective of whether these are notifiable, where the target of concentration provides “services in the digital sector” or enables “the collection of data”.⁸⁹ Under Article 14(4),(5) DMA the COM shares this information with the Member States, which are then intended to be able to refer concentrations to the COM pursuant to Article 22 ECMR and, based on the practice described above, they will be able to do so even in cases where the concentration would not be notifiable under national law.⁹⁰ Although such a referral can generally still be made after completion of a concentration, there is a time limit for the request starting from the date on which the concentration was notified or otherwise made known to the Member State concerned, Article 22(1) ECMR.

In the literature, obligations to notify intended concentrations involving large digital companies have been welcomed⁹¹ as this could enable authorities to improve both their control of compliance with the obligation to notify mergers which exceed the threshold values⁹² as well as their knowledge of the market conditions⁹³. According to the literature, it should also be possible based on such information to review even those concentrations which do not exceed the threshold values in order to provide some kind of “safety net”.⁹⁴ Against this backdrop the literature also proposes in particular to introduce into German law an obligation to inform the competition authority about concentrations involving companies which have been found to be of paramount significance for competition across markets pursuant to Section 19a(1) GWB.⁹⁵ Reasons for this include especially the fact that Section 19a

⁸⁹ Cf. *Carugati*, Merger Review in the Digital Markets Act, 2022, pp. 18 ff. (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4203210) for example on the question of which concentrations between gatekeepers the COM should review within its scope of discretion following a referral.

⁹⁰ Cf. Recital 71 of the DMA: “Furthermore, the Commission should inform Member States of such information, given the possibility of using the information for national merger control purposes and as, under certain circumstances, it is possible for the national competent authority to refer those acquisitions to the Commission for the purposes of merger control.”

⁹¹ *CMA*, A new pro-competition regime for digital markets, 2020, p. 59; *Furman et al.*, Unlocking digital competition, 2019, p. 95; *Motta/Peitz*, Big Tech Mergers, Discussion Paper Series CRC TR 224, May 2020, p. 34; *Podszun*, Empfiehlt sich eine stärkere Regulierung von Online-Plattformen und anderen Digitalunternehmen?, 2020, p. 83.

⁹² *CMA*, A new pro-competition regime for digital markets, 2020, p. 59.

⁹³ *Podszun*, Opinion prepared for the Committee on Economic Affairs and Energy of the German Bundestag, Committee printed paper 19(9)887, 23 November 20, p. 28.

⁹⁴ *CMA*, A new pro-competition regime for digital markets, 2020, p. 61 (“[...] we propose that there should be some form of ‘safety net’ that would enable the CMA to review acquisitions by firms with SMS that did not trigger mandatory notification (such as acquisitions of material influence) but could nevertheless raise competition concerns. More detailed consideration will have to be given to the design of this mechanism (including, for example, whether such transactions may be subject to the existing merger control regime or whether some other form of ‘call-in’ would be a more appropriate way of achieving this aim”).

⁹⁵ *Podszun*, Opinion prepared for the Committee on Economic Affairs and Energy of the German Bundestag, Committee printed paper 19(9)887, 23 November 20, p. 28.

GWB has a more comprehensive personal scope of application than the DMA (and thus also a more comprehensive scope than the obligation to inform about concentrations under Article 14 DMA).⁹⁶ It would have to be taken into account, however, that the statutory provision would have to ensure that the proposed concentrations to be taken up have a sufficient local nexus.

Proposals which result in a general obligation to notify mergers for certain categories of companies or concentrations are to be distinguished from the mere supplementary obligation to inform the competition authority, including a temporary option to review the concentration. An example of such an additional criterion is the option pursuant to Section 39a GWB, which the Bundeskartellamt can use subject to certain preconditions to order by formal decision that a company must notify every merger with other companies in one or several specific sectors of the economy. However, Section 39a GWB as such has in some cases been considered less suitable for addressing the particularities of digital concentrations.⁹⁷ Firstly, the provision is based on the condition that the target company achieves more than two thirds of its turnover in Germany. According to the literature this is not likely to be the case for digital companies which often operate internationally.⁹⁸ Secondly, the formal decision to notify mergers requires that a sector inquiry pursuant to Section 32e GWB has been carried out for each economic sector concerned prior to the decision. In view of the dynamic nature of the digital economy this is considered to be a very time-consuming procedural requirement.⁹⁹ All in all, the option to impose an obligation pursuant to Section 39a GWB is thus not likely to be a suitable tool to better capture merger cases in the digital economy which raise competition concerns.

Some authors suggest introducing an extended obligation to notify mergers to be imposed on companies designated under Section 19a(1) GWB.¹⁰⁰ In comparison to an obligation to inform

⁹⁶ See *BKartA*, Digital Markets Act: Perspectives in (inter)national competition law, 2021, pp. 4 ff. (https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2021/Working_Group_on_Competition_Law_2021.pdf).

⁹⁷ *Monopolies Commission*, Policy Brief – 10. GWB-Novelle, January 2020, p. 7; *Studienvereinigung Kartellrecht* (Competition Lawyers' Association), Stellungnahme 10. GWB-Novelle, 13 February 2020, para. 135.

⁹⁸ *Monopolies Commission*, Policy Brief – 10. GWB-Novelle, Januar 2020, S. 7; *Studienvereinigung Kartellrecht*, Stellungnahme 10. GWB-Novelle, 13 February 2020, para. 135; as a relativising perspective *Becker*, Fusionskontrolle unterhalb der Aufgreifschwelle, ZWeR 2020, pp. 365 ff. (387 f.).

⁹⁹ *Monopolies Commission*, Policy Brief – 10. GWB-Novelle, January 2020, p. 7, emphasises the “frequently changing relevant product market(s)”. (Translation provided by the Bundeskartellamt)

¹⁰⁰ *Podszun*, Opinion prepared for the Committee on Economic Affairs and Energy of the German Bundestag, Committee printed paper 19(9)887, 23 November 2020, p. 28, “It is recommended [...] that norm addressees of Section 19a [...] be subject to an obligation to inform about or *notify* their mergers if there is a sufficient domestic nexus.” (Emphasis added, translation provided by the Bundeskartellamt)

about concentrations with a temporary option for the competition authority to take up a case, an obligation to notify mergers would absorb resources both at the authorities and the companies, even if the proposed concentrations do not raise any competition concerns. However, compared to an obligation to inform, the obligation to notify would have the advantage that it could be based on existing and proven procedural rules. Furthermore, an obligation to notify would be in line with the concept of merger control as a prohibition subject to approval and would thus not cause any additional divestment problems in the case of a prohibition. However, if an obligation to notify mergers were to be imposed on the addressees of Section 19a(1) GWB, a certain constructive change could be implied as the designation procedure under this provision currently does not entail any legal consequence other than the determination of a company as an addressee, whereas prohibition decisions must be based on the separate provision set out in Section 19a(2) GWB. In addition, it is an open issue whether the extended obligation to notify mergers is to apply to all concentrations intended by an addressee within the meaning of Section 19a(1) GWB or whether the type of projects to be notified would have to be defined even more narrowly in terms of substance. Finally, it must be considered that the proposed concentration would have to show a sufficient local nexus. All in all, this is a promising approach which, by establishing a link to the requirements under Section 19a(1) GWB, purposefully focuses on mergers involving companies that have already been found to be of paramount significance across markets. Based on the designation under Section 19a(1) GWB it has already been established that such companies pose a particular threat to (the remaining) competition. This threat becomes even more acute if such a company uses its external growth to expand into new markets or acquires (potential) competitors in markets that it already controls. In view of the acute threat posed by such projects, an extended jurisdiction of agencies to examine mergers intended by such companies would be justified.

IV. Discussion about an ex-post possibility to take up cases

Both the German and the European law on merger control are construed as a prohibition subject to approval. The rules therefore require companies and competition authorities to make a forecast decision prior to implementing the transaction as to whether the merger will have an impact on competition in the future. In view of the potentially high level of uncertainty in forecasting the effects of a merger in the digital sector, there are various considerations for supplementing this ex-ante control of mergers in the digital sector with the possibility of taking action even after implementing the transaction (ex post).

Such an ex-post possibility for authorities to take up a case is seen as beneficial in some of the literature.¹⁰¹ It is emphasised, for example, that in contrast to an ex-ante approach, the number of transactions that have to be examined can be reduced in this way and the issue of forecast uncertainty associated with ex-ante approaches can be addressed.¹⁰² At the same time, however, the ex-post possibility to take up a case is met with considerable concern in parts of the literature.¹⁰³ Reference is made in particular to the fact that even an authority's temporary power to divest companies following the transaction would result in considerable uncertainties for the parties involved.¹⁰⁴ This could mean, for example, that the integration of the companies is not driven forward within the intervention period and that corresponding synergies are not leveraged or other useful entrepreneurial measures are not taken.¹⁰⁵ Furthermore, it is pointed out that with the concept of market structure abuse the basis for an ex-post control already exists to a certain extent de lege lata.¹⁰⁶ According to the literature, this, however, only applies if the company is already dominant, i.e. the concept does not capture cases where a company is establishing its dominant position through the merger, and may involve considerable investigative efforts on the part of the authorities.¹⁰⁷ An ex-post possibility to take up a case would also have to take into account that divestitures by

¹⁰¹ Assessing the pros and cons *Apel/Polley*, "Gap cases" in der formellen Fusionskontrolle der FKVO?, ZWeR 2021, pp. 273 ff. (311 ff.); *Rizzo*, Digital Mergers, JECLP 2021, pp. 4 ff. (13); *Podszun*, Empfiehlt sich eine stärkere Regulierung von Online-Plattformen und anderen Digitalunternehmen?, 2020, p. 83; with regard to the Federal Government's announcement to introduce the possibility to divest companies outside the scope of remedies for abusive conduct (not limited to external growth), see also *Zimmer*, Agenda 2025, D'Kart, 3 May 2022 ("[...] the question may be raised whether clearance decisions in cases in which the post-merger market conditions have developed differently than forecast by the companies and the authorities must necessarily continue to apply with eternal effect. It is precisely the uncertain nature of forecasting the future that could be a reason for authorities to follow up on trends towards concentration raising concerns years after the clearance of a merger and to call for the possibility to divest a service in cases such as the Facebook/WhatsApp merger." (Translation provided by the Bundeskartellamt) <https://www.d-kart.de/blog/2022/05/03/agenda-2025-missbrauchsunabhaengige-entflechtung-in-der-wettbewerbspolitischen-agenda-des-bmwk/>).

¹⁰² *Apel/Polley*, "Gap cases" in der formellen Fusionskontrolle der FKVO?, ZWeR 2021, pp. 273 ff. (311 f.).

¹⁰³ *Becker*, Fusionskontrolle unterhalb der Aufgreifschwelle, ZWeR 2020, pp. 365 ff. (381); *Schallbruch et al.*, Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft, 2019, pp. 68 f.

¹⁰⁴ *Schallbruch et al.*, Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft, 2019, p. 68.

¹⁰⁵ *Schallbruch et al.*, Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft, 2019, pp. 68 f.

¹⁰⁶ Sympathising with this *Apel/Polley*, "Gap cases" in der formellen Fusionskontrolle der FKVO?, ZWeR 2021, pp. 273 ff. (315); *Bourreau/de Streel*, Big Tech Acquisitions, 2020, p. 21; *Schweitzer et al.*, Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen, 2018, pp. 124 ff. also point out that not only the individual acquisition of a company can be taken as a basis but potentially also "the overall entrepreneurial strategy of systematically fending off future competitive threats at an early stage, from which the threat to competition arises". (Translation provided by the Bundeskartellamt) In more relative terms, however, *Podszun/Kersting*, Eine Wettbewerbsordnung für das digitale Zeitalter, ZRP 2019, pp. 34 ff. (36) ("A fully developed concept for recasting the abuse of market structures has not yet been presented.") (Translation provided by the Bundeskartellamt)

¹⁰⁷ *Becker*, Fusionskontrolle unterhalb der Aufgreifschwelle, ZWeR 2020, pp. 365 ff. (378 ff.).

authorities may involve practical and legal challenges.¹⁰⁸ Moreover, it would have to be taken into consideration that in each individual case, any action taken by the authority would have to be based on sound discretionary considerations.

¹⁰⁸ See *Immenga/Mestmäcker-Thomas, Wettbewerbsrecht*, 2020, § 41 GWB para. 104.

C. Implications for the substantive prohibition criteria

The characteristics of digital markets and the challenges posed by mergers in the digital sector discussed above also have an effect on the substantive prohibition criteria. In the literature the problem is often discussed whether the traditional theories of harm adequately address these challenges (I.). It is also questioned whether the existing legal framework needs to be adjusted. This applies both to the substantive prohibition criterion (II.) and the corresponding rules of evidence (III.).

On the one hand, the following deliberations will show that the theories of harm are in need of further development to be able to better address digital mergers that raise competition concerns. On the other, it will become clear that this development should be accompanied by modifications to the substantive criteria to address legal uncertainty associated with the scope of the current substantive test.

Significance and potential of the SIEC test

The significant impediment to effective competition (SIEC) test was introduced into German competition law with the 8th amendment to the GWB in 2013, in particular for the purpose of allowing prohibitions in cases where competition is impeded but the condition of single firm dominance is not fulfilled. The aim was to facilitate the harmonised assessment of merger projects in Germany and Europe as the SIEC test had already been introduced at the European level in 2004. The SIEC test is to ensure in particular that competition concerns with regard to complex oligopoly cases and unilateral conduct of companies can be met more effectively. It is also meant to facilitate the assessment of vertical or conglomerate mergers where a negative impact on the market structure does not occur immediately with the merger.¹⁰⁹

More recent court decisions which have not yet become final partly restrict the scope of application of the SIEC test. As to European case practice, the European General Court set high requirements for proving the existence of an SIEC in the *Hutchington 3G/Telefónica* case, which concerned markets with a low degree of differentiation. In the view of the court it must be shown that the concentration eliminates a particularly outstanding competitive force and that the parties are very close competitors. The judgment also implies that quantitative analyses undertaken to prove the existence of an SIEC must fulfil high requirements.¹¹⁰ Furthermore, the court held that an SIEC, the existence of which is inferred from a body of

¹⁰⁹ Government draft bill, Bundestag printed paper 17/9852, p. 28.

¹¹⁰ *Zimmer*, *Erinnerungen an Airtours: Zum Urteil des EuG im Fall CK Telecoms UK/Kommission*, WuW 2020, pp. 354 ff.

evidence and indicia and which is based on several theories of harm, must be proven “with a strong probability”. According to the court the “more likely than not” standard of proof was not sufficient in this respect.¹¹¹

In Germany the Düsseldorf Higher Regional Court rejected the Bundeskartellamt’s prohibition of the XXXLutz/Roller merger case with regard to the assessment of heterogeneous overall markets with a high degree of differentiation based on the SIEC test. Firstly, as to the assessment of the competitive closeness of the parties to the merger and other market participants, the court reached a conclusion which differed from the Bundeskartellamt’s investigation results. Secondly, the court held that circumstances beyond the affected market areas could also be considered as factors opposing a reduction of competitive pressure.¹¹²

Should these legal opinions be confirmed by the courts of final instance, it would only be possible in very rare case scenarios to establish the existence of an SIEC without market dominance. This stands in some contrast to the findings in recent literature that the delta of the merger-related increase in market concentration, in particular, is essential for assessing consumer harm caused by the unilateral effects of a horizontal merger.¹¹³

In the literature, the SIEC test is generally seen as a suitable criterion for assessing concentration projects, also with a view to the digital economy.¹¹⁴ However, some proposals have been made for developing the SIEC test’s application practice. *Schallbruch et al.* think that the probability standard required to establish the existence of an SIEC should depend on the acquirer’s degree of market power. Furthermore, with regard to the digital economy, the contestability of consolidated positions of power should play a key role. According to the authors, new theories of harm should be developed which focus more strongly on, among other factors, business strategies and innovation processes in digital markets.¹¹⁵ *Crémer et al.* perceive a gap in the theories of harm which have so far been used in the SIEC test’s application practice, in particular with regard to conglomerate mergers in the digital economy.

¹¹¹ *General Court*, CK Telecoms vs European Commission, judgment of 28 May 2020, para. 118.

¹¹² *Düsseldorf Higher Regional Court*, Mann Mobilia vs Bundeskartellamt, decision of 9 March 2022, VI-Kart 2/21 (V), paras. 115, 278.

¹¹³ *Nocke/Whinston*, Concentration Screens for Horizontal Mergers, NBER Working Paper 27533, 2020, p. 1.

¹¹⁴ *Crémer et al.*, Competition policy for the digital era, 2019, pp. 116 f.; *Podszun*, Empfiehlt sich eine stärkere Regulierung von Online-Plattformen und anderen Digitalunternehmen?, 2020, p. 84; *Schallbruch et al.*, Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft, 2019, p. 66. *Schweitzer et al.* are of the opinion that the SIEC test can cover merger cases whose anti-competitive effects can be proven by using the concept of potential competition. However, the authors hold that the test shows a weakness in covering acquisition strategies which focus very strongly on innovative companies whose business models do not yet show any connection to the acquirer’s core market (*Schweitzer et al.*, Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen, 2018, p. 123).

¹¹⁵ *Schallbruch et al.*, Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft, 2019, pp. 70 f.

If, for example, the operator of a digital ecosystem buys up companies that are active in neighbouring markets, the authors' view is that horizontal effects should be more strongly considered in the assessment by taking into account the entire ecosystem.¹¹⁶ The proposal discussed by *Schweitzer et al.* also suggests that a broader market definition should be used for concentration projects covered by the transaction value threshold in order to take greater account of potential competitors already at this stage.¹¹⁷

I. Theories of harm

A crucial question in the assessment of digital concentration projects under competition law is whether anti-competitive effects potentially caused by the concentration are sufficiently covered by the established theories of harm. The following sections will discuss horizontal (1.) and non-horizontal (2.) theories of harm, which have been examined in recent years in the course of the assessment of concentration projects proposed by large digital companies¹¹⁸. This will lead to the question of which efficiency gains could offset the harm to competition caused by digital mergers (3.). Proposals from the literature will then be discussed to look at how theories of harm relating to digital mergers could be further developed (4.).

1. Horizontal theories of harm

A horizontal merger can result in a significant impediment to effective competition in particular by reducing the competitive pressure in markets where the parties to the merger previously used to compete with each other. First, the merger eliminates the competitive pressure the parties exerted on each other. Price increases (or quality reductions) introduced by one of the parties, which prior to the merger would have been unprofitable due to the high number of buyers expected to switch to other suppliers, could become profitable after the merger based on the (partial) internalisation of this volume effect. Second, the other market participants gain a greater scope of action as they anticipate that the parties to the merger will now compete less aggressively in the market. As a consequence, these companies could also consider price increases (or quality reductions) to be profitable, which was not the case prior to the merger. Ultimately the overall intensity of competition in the market will decrease,

¹¹⁶ *Crémer et al.*, Competition policy for the digital era, 2019, pp. 116 f.

¹¹⁷ *Schweitzer et al.*, Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen, 2018, p. 124.

¹¹⁸ Below the threshold of the large digital companies the *Bundeskartellamt* has gained some experience in dealing with mergers in the digital economy, in particular with regard to platforms and access to data relevant for competition, for example merger projects in the sectors of ticketing system services (B6-35/17, CTS Eventim/Four Artists), online dating platforms (B6-57/15, Oakley Capital/EliteMedianet; B6-29/20, ProSiebenSat.1 Media/The Meet Group), online real estate platforms (B6-39/15, Axel Springer/Immowelt) and insurance services (B9-49/20, Allianz/ControlExpert).

at least in cases where the concentration does not result in very substantial efficiency gains between the parties.

In digital markets, network effects can reinforce the competition problem caused by a horizontal merger. Network effects can make market entries and expansions difficult for competitors as, from the customers' point of view, they make switching to other suppliers less attractive. Network effects can thus provide the parties to the merger with market power which can be further strengthened by the merger, for example due to the increase in network effects this involves.¹¹⁹ On the other hand, multi-homing can generally curb the market power of the parties, at least with regard to the individual market concerned. In the COM's assessment of, among other cases, the proposed Facebook/WhatsApp und Microsoft/Skype mergers in which network effects and multi-homing were considered, the elimination of existing competitive pressure played a role.¹²⁰

In many cases, users do not pay a monetary price for consuming digital products or services. Monetisation is rather achieved through advertising, for example, which in the literature is sometimes referred to as 'markets for attention' or 'attention oligopoly',¹²¹ whereas terms such as 'audience providing platform' can be found in competition law contexts.¹²² Mergers between digital companies, in particular, which compete with regard to their advertising inventory and thus for the attention of users, can increase the market power of the parties to the merger in the area of online advertising even if the parties are not in direct competition for the products offered to users.¹²³ In contrast to the pro-competitive effect of multi-homing in digital product markets described above, multi-homing between the products of the parties to the merger can even reinforce the anti-competitive effect of a merger in the area of online advertising. In this case some of the users may only be accessible to advertisers through the parties to the merger, thus increasing the market power of the parties.¹²⁴ The COM examined

¹¹⁹ *Argentesi et al.*, Ex-post Assessment of Merger Control Decisions in Digital Markets, 2019, pp. 23 ff.; *Argentesi et al.*, Merger Policy in Digital Markets: An ex post Assessment, Journal of Competition Law & Economics, 2020, pp. 95 ff. (105 f.).

¹²⁰ Case M.7217 – Facebook/WhatsApp, paras. 127 ff.; Case M.6281 – Microsoft/Skype, paras. 85 ff.

¹²¹ Cf. e.g. *Prat/Valletti*, Attention Oligopoly, American Economic Journal: Microeconomics 2022, pp. 530 ff. However, a differentiation must be made between the term "markets for attention" and the market concept within the meaning of competition law. In particular, it would not be appropriate to include all services competing for the users' attention in one and the same market. See also *Federal Court of Justice*, decision of 23 June 2020, case no KVR 69/19, paras. 20ff.

¹²² See e.g. *BKartA*, Working paper – Market Power of Platforms and Networks, June 2016, pp. 22 ff.

¹²³ *Argentesi et al.*, Merger Policy in Digital Markets: An ex post Assessment, Journal of Competition Law & Economics, 2020, pp. 95 ff. (106).

¹²⁴ *Argentesi et al.*, Ex-post Assessment of Merger Control Decisions in Digital Markets, 2019, pp. 28 f., 45; *Argentesi et al.*, Merger Policy in Digital Markets: An ex post Assessment, Journal of Competition Law & Economics, 2020, pp. 95 ff. (106 f.).

the competition effects on ‘markets for attention’ e.g. in its assessment of the proposed Facebook/WhatsApp and Microsoft/LinkedIn mergers.¹²⁵ As *Motta/Peitz* have emphasised, mergers affecting ‘markets for attention’ can under certain circumstances also cause harm because they create incentives to generate more advertising content, which from the perspective of consumers makes the offer less attractive.¹²⁶

Data play a decisive role in competition on digital markets. With regard to horizontal theories of harm, the combination of the parties’ data that are relevant for competition can generate economies of scale which can create competitive advantages. In its examination of the Microsoft/Yahoo merger project, for example, the COM analysed whether combining the parties’ data and their user base on the market for online search engines (dominated by Google) would make them more competitive.¹²⁷ In the Microsoft/LinkedIn case, the COM examined, among other factors, whether the parties gained competitive advantages in the market for online advertising by combining their data.¹²⁸

If, at the time of the examination, the parties do not have any significant horizontal overlaps, the elimination of potential competition can be considered within the context of horizontal theories of harm. Potential competition can be caused by the possibility of a party to the merger entering the market of the other party or, in the case of already existing but as yet insignificant horizontal overlaps, by the possibility that this party could develop into a relevant competitor due to its high potential for growth. However, it must also be examined whether there are a sufficient number of other current or potential competitors that could maintain competitive pressure.¹²⁹ The COM examined the threat of elimination of potential competition e.g. in the Google/DoubleClick case.¹³⁰ This theory of harm was also important in the assessment of the proposed Facebook/Instagram merger by the UK Office of Fair Trading.¹³¹

The ‘killer acquisition’ discussed in section A.II represents a special case of a theory of harm focusing on the elimination of potential competition. In this case, the potential competitive pressure exercised by the target company's products or innovation efforts is not eliminated

¹²⁵ Case M.7217 – Facebook/WhatsApp, paras. 164 ff.; Case M.8124 – Microsoft/ LinkedIn, paras. 167 ff.

¹²⁶ *Motta/Peitz*, Big Tech Mergers, Discussion Paper Series CRC TR 224, May 2020, p. 22.

¹²⁷ Case M.5727 – Microsoft/Yahoo! Search Business, paras. 183 ff.; *Kadar/Bogdan*, ‘Big Data’ and EU Merger Control – A Case Review, *Journal of European Competition Law & Practice*, 2017, pp. 479 ff. (480 f.).

¹²⁸ Case M.8124 – Microsoft/LinkedIn, paras. 176 ff.; *Kadar/Bogdan*, ‘Big Data’ and EU Merger Control – A Case Review, *Journal of European Competition Law & Practice*, 2017, pp. 479 ff. (484 ff.).

¹²⁹ *Argentesi et al.*, Merger Policy in Digital Markets: An ex post Assessment, *Journal of Competition Law & Economics*, 2020, pp. 95 ff. (108). See also *BKartA*, Guidance on Substantive Merger Control, March 2012, pp. 25 ff.

¹³⁰ Case M.4731 – Google/DoubleClick, paras. 222 ff.

¹³¹ ME/5525/12 – Facebook/Instagram, paras. 10 ff.

because the acquirer integrates the products or efforts into its business strategy but because these products are removed from the market or the innovation efforts are stopped. Killer acquisitions can thus not only result in less attractive offers due to higher prices and poorer product quality, but also in reducing the variety of the products offered.¹³² This also applies to cases where the acquirer stops offering its own products or ceases its efforts to innovate, which benefits the target company's products (sometimes referred to as 'reverse killer acquisition', see above, section A.II.). Killer acquisitions can also contribute to the emergence of a 'kill zone' which prevents young companies from investing in radical innovations (see section A.II).

The phenomena 'killer acquisition' and 'kill zone' lead to another aspect of horizontal theories of harm, namely negative effects on innovation caused by mergers. Competition for future sales can create positive incentives for the companies' innovation activities, which is why a merger between two competing companies can lead to reduced innovation efforts.¹³³ In its assessment of the proposed Dow/Dupont merger the COM set forth an innovation-based theory of harm for the first time without specifically referring to already existing or future markets.¹³⁴ The COM used the terms 'innovation competition' (in distinction from product and price competition on specifically identified product markets, which it also examined) and 'innovation spaces' (in distinction from product markets). The COM examined firstly whether the merger could reduce incentives for continuing parallel innovation efforts that were already ongoing. Secondly it analysed negative effects on incentives for future product innovation.¹³⁵

2. Non-horizontal theories of harm

Essential aspects for assessing the competitive position of large digital companies are their potential function as 'gatekeepers',¹³⁶ i.e. their ability to control access to key products,

¹³² OECD, Start-ups, Killer Acquisitions and Merger Control, 2020, p. 31.

¹³³ Shapiro, Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets, Journal of Economic Perspectives, 2019, pp. 69 ff. (75). For more details see also BKartA, Innovations – Challenges for Competition Law Practice, 2017, pp. 11 ff.

¹³⁴ Case M.7932 – Dow/DuPont, paras. 1955 ff. Although this merger project did not involve any digital companies, it provides useful approaches to the analysis of innovation-based theories of harm in the digital economy.

¹³⁵ Argentesi et al., Ex-post Assessment of Merger Control Decisions in Digital Markets, 2019, p. 34; Argentesi et al., Merger Policy in Digital Markets: An ex post Assessment, Journal of Competition Law & Economics, 2020, pp. 95 ff. (115 f.); Bourreau/de Streel, Digital Conglomerates and EU Competition Policy, 2019, p. 31.

¹³⁶ In this context, 'gatekeeper' describes an actual phenomenon; the term is thus not necessarily completely identical with the scenarios covered by the DMA's normative concept which uses the same term, cf. Article 3 DMA.

services or user groups, and their potential role as operators of a cross-market ecosystem. In particular, digital companies can gain, secure and expand these positions, which are essential for access to user groups, by expanding their portfolio of products and services. Acquisitions of companies in neighbouring or otherwise related markets are of decisive importance in this respect.¹³⁷ Non-horizontal theories of harm therefore play a key role in the assessment of digital mergers.

In the case of vertical mergers where the target company operates in an upstream market, the analysis generally looks at the question of whether the acquirer has the possibility and incentive to foreclose its competitors' access to the target company's products, which are essential input supplies for its own core products ('input foreclosure'), and on the effect this would have on competition in the acquirer's core market.¹³⁸ Data are an important competitive factor for many digital business models. Sector-specific datasets collected by third parties, for example, can be an input factor for specific products or services that cannot (or not easily) be replaced. Theories of harm concerning the foreclosure of the target company's data representing an input factor have been examined by the COM in, for example, the Google/Fitbit, IMS Health/Cegedim Business and Meta/Kustomer cases.¹³⁹

Foreclosure effects can also result from the combination of previously independent datasets of the parties to the merger. The quality of digital products or services can sometimes (up to a certain degree) depend on the volume or the diversity of the data on which they are based. In the case of online search engines, for example, large datasets used to train the search algorithms ('click and query data') can lead to better search results.¹⁴⁰ If the appeal of digital products increases with the increasing volume or diversity of the data available, the combination of their datasets can provide the parties to a merger with a competitive advantage, which makes it more difficult for other competitors to offer a competitive product.¹⁴¹ Theories of harm based on the combination of the parties' datasets have been

¹³⁷ *Bourreau/de Streel*, Digital Conglomerates and EU Competition Policy, 2019, pp. 19 ff.

¹³⁸ *Bourreau/de Streel*, Digital Conglomerates and EU Competition Policy, 2019, p. 30. See also *BKartA*, Guidance on Substantive Merger Control, March 2012, pp. 55 ff.

¹³⁹ Case M.9660 – Google/Fitbit; paras. 503 ff.; Case M.7337 – IMS Health/Cegedim Business, paras. 205 ff.; COM, press release on the clearance of the proposed acquisition M.10262 – Meta/Kustomer, 27 January 2022 (https://ec.europa.eu/commission/presscorner/detail/en/IP_22_652); *Kadar/Bogdan*, 'Big Data' and EU Merger Control – A Case Review, *Journal of European Competition Law & Practice* 2017, pp. 479 ff. (482 f.).

¹⁴⁰ *Argentesi et al.*, Ex-post Assessment of Merger Control Decisions in Digital Markets, 2019, p. 43; *BKartA*, decision of 5 January 2022, Ref. B7-61/21 (Google), paras. 277 f.

¹⁴¹ *Argentesi et al.*, Ex-post Assessment of Merger Control Decisions in Digital Markets, 2019, pp. 39 f. *Argentesi et al.* point out, however, that in this case the foreclosure effect resulted not so much from the abuse of market power, but rather from merger-induced efficiencies. *Motta/Peitz* state that only in very special scenarios was consumer harm to be expected as a result of combining

examined by the COM in, for example, the Apple/Shazam, Facebook/WhatsApp, Google/DoubleClick and Microsoft/LinkedIn cases.¹⁴²

The assessment of conglomerate mergers under competition law focuses on possible foreclosure strategies based on tying or bundling different products.¹⁴³ Although tying or bundling are not generally seen as anti-competitive practices but as rather desirable from the consumers' point of view, they can, under certain circumstances, develop a foreclosure effect by enabling a company to transfer its market power from one market to another.¹⁴⁴ Tying or bundling can also be part of an 'envelopment' strategy (see A.II.). It can also contribute to creating, strengthening and/or securing digital ecosystems. In this case market entries could be made more difficult by the fact that new competitors would have to enter several markets at the same time in order to be able to compete.¹⁴⁵ Digital companies can achieve a tying effect by using preinstallations, for example, or by integrating a product or service into another product.¹⁴⁶ Possible foreclosure effects of such strategies were examined by the COM in the Microsoft/LinkedIn and Microsoft/Skype cases, among other cases.¹⁴⁷ Another possibility for implementing foreclosure strategies is to restrict interoperability. This option played a role in, for example, the COM's analysis of the proposed Google/Fitbit and Meta/Kustomer mergers.¹⁴⁸

Network effects can increase the effect of foreclosure strategies, for example by making the parties' products more attractive, which can contribute to a market 'tipping' in the parties' favour and to strengthening or securing a potentially existing ecosystem. In addition, network effects can raise the barriers to market entry for potential competitors. On the other hand, if users tend to 'multi home', this can generally mitigate the effect of foreclosure strategies, at least with regard to the market in question.¹⁴⁹ Network effects and 'multi-homing' were

the parties' datasets (*Motta/Peitz*, Big Tech Mergers, Discussion Paper Series CRC TR 224, May 2020, p. 30).

¹⁴² Case M.8788 – Apple/Shazam, paras. 313 ff.; Case M.7217 – Facebook/WhatsApp, paras. 180 ff.; Case M.4731 – Google/DoubleClick, paras. 359 ff.; Case M.8124 – Microsoft/LinkedIn, paras. 176 ff.

¹⁴³ *BKartA*, Guidance on Substantive Merger Control, March 2012, pp. 65 ff.

¹⁴⁴ *Bourreau/de Streel*, Digital Conglomerates and EU Competition Policy, 2019, p. 29; *OECD*, Roundtable on Conglomerate Effects of Mergers, 2020, pp. 10 ff.

¹⁴⁵ *OECD*, Roundtable on Conglomerate Effects of Mergers, 2020, pp. 27 f.

¹⁴⁶ *Argentesi et al.*, Ex-post Assessment of Merger Control Decisions in Digital Markets, 2019, p. 36.

¹⁴⁷ Case M.8124 – Microsoft/LinkedIn, paras. 295 ff.; Case M.6281 – Microsoft/Skype, paras. 133 ff.

¹⁴⁸ Case M.9660 – Google/Fitbit, paras. 716 ff.; *Witt*, Who's Afraid of Conglomerate Mergers?, The Antitrust Bulletin 2022, pp. 208 ff. (222); *COM*, Press release on the clearance of the proposed merger M.10262 – Meta/Kustomer, 27 January 2022 (https://ec.europa.eu/commission/presscorner/detail/en/IP_22_652).

¹⁴⁹ *Argentesi et al.*, Ex-post Assessment of Merger Control Decisions in Digital Markets, 2019, pp. 36-39.

relevant in the examination of possible foreclosure strategies in, for example, the Microsoft/LinkedIn and Google/DoubleClick cases.¹⁵⁰

3. Taking efficiencies into account

Efficiency gains associated with a merger can, under certain circumstances, put the expected anti-competitive effects into perspective. Non-horizontal mergers in particular are commonly thought to hold great potential for creating efficiency gains since the services or products of the parties involved can complement each other. Such mergers are expressions of the search for a company's optimal boundaries, which according to *Crémer et al.* is an important part of the competitive process.¹⁵¹ However, especially in connection with digital ecosystems, product improvements achieved, for example, by combining data or functionalities can also result in increased barriers to market entry and may thus possibly impede dynamic competition. Merger-related efficiencies can therefore have an ambivalent effect.

Several authors argue that some of the characteristics typical of digital markets and business models can increase the potential for merger-related efficiencies. They hold that, in the case of horizontal mergers, for example, positive network effects can lead to consumers benefiting from higher market concentration.¹⁵² According to some authors, digital ecosystems create synergies by offering consumers the possibility of "one-stop shopping".¹⁵³ Acquisitions of small, innovative start-ups by large digital companies can, in their view, also create synergies and efficiencies by bringing together the acquirer's capabilities and resources and the target company's innovative ideas, products and services. In the authors' view, one of the results is that innovative products can be brought to market more quickly and effectively and higher-quality products can be offered at lower prices.¹⁵⁴ In their view, the prospect of a later takeover by a large digital company also spurs innovation in the start-up community and creates corresponding incentives for investors to provide financing for such start-ups.¹⁵⁵ Lastly, it is

¹⁵⁰ Case M.8124 – Microsoft/ LinkedIn, paras. 295 ff.; Case M.4731 – Microsoft/ DoubleClick, paras. 302 ff.

¹⁵¹ COM, Guidelines on the assessment of non-horizontal mergers, 2008, p. 7; *Crémer et al.*, Competition policy for the digital era, 2019, p. 110.

¹⁵² *Motta/Peitz*, Big Tech Mergers, Discussion Paper Series CRC TR 224, May 2020, p. 21.

¹⁵³ *Motta/Peitz*, Big Tech Mergers, Discussion Paper Series CRC TR 224, May 2020, p. 30; *OECD*, Roundtable on Conglomerate Effects of Mergers, 2020, p. 27.

¹⁵⁴ *Bourreau/de Streel*, Big Tech Acquisitions, 2020, p. 8; *Crémer et al.*, Competition policy for the digital era, 2019, pp. 110 f.; *Furman et al.*, Unlocking digital competition, 2019, pp. 90 f.; *Schallbruch et al.*, Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft, 2019, pp. 65 ff.; *Rizzo*, Digital Mergers, JECLP 2021, pp. 4 ff. (9).

¹⁵⁵ *Cabral et al.*, The EU Digital Markets Act, Publications Office of the European Union, 2021, p. 26; *Crémer et al.*, Competition policy for the digital era, 2019, p. 111; *Schallbruch et al.*, Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft, 2019, p. 65.

held that some mergers could generate efficiencies by eliminating inefficient parallel innovative efforts by the parties to the merger.¹⁵⁶

Experience to date has shown, however, that efficiencies generally cannot offset the negative effects of a merger between important competitors. At European level, the relevant companies pleaded the efficiency defence in several cases, but such efficiencies were in most cases rejected by the COM or classified as not relevant to the decision.¹⁵⁷ In order to be able to assess the efficiency defence in the event of an examination, the Bundeskartellamt also has to obtain detailed information particularly on the market-related nature of the efficiencies, the proof of a close connection between the efficiencies and the merger, the substance and verifiability of the efficiency gains claimed and the expected passing on of such efficiency gains to customers.¹⁵⁸ In addition to the efficiency defence, German competition law provides for another, partly comparable approach for taking efficiency considerations into account, namely the so-called balancing clause under Section 36(1) sentence 2 no 1 GWB.

4. Suggestions for developing the theories of harm

Despite the manifold horizontal and non-horizontal theories of harm considered in assessing the merger projects of large digital companies mentioned in 1. and 2. above, not a single one of these projects was prohibited. This has raised concerns expressed in the literature that the existing approach to assessing mergers in the digital economy has to be improved or that the arsenal of theories of harm is incomplete, which may have led to wrong decisions in some cases.¹⁵⁹

For one thing, the way in which the characteristics of digital markets and business models are considered in merger control are criticised as deficient. One example mentioned is the Facebook/Instagram case in which factors such as the exclusivity and size of the user base were neglected.¹⁶⁰ It is also argued that better account has to be taken of the multi-sidedness

¹⁵⁶ *Cabral et al.*, The EU Digital Markets Act, Publications Office of the European Union, 2021, p. 26.

¹⁵⁷ The COM takes efficiency gains that have been proven into account when assessing mergers under merger control. Such efficiencies have to benefit consumers in a timely manner and in the relevant markets, be merger-specific (i.e. they must not be achievable on a similar scale by less harmful alternatives) and verifiable, see *COM*, Guidelines on the assessment of non-horizontal mergers, paras. 76 ff.

¹⁵⁸ See, for example, *BKartA*, decision of 31 March 2015, case no B2-96/14 (Edeka/Kaiser's Tengelmann), paras. 380 ff.; *BKartA*, decision of 14 May 2014, case no B3-135/13 (Klinikum Esslingen/Kreiskliniken Esslingen), paras. 285 ff.; *BKartA*, decision of 17 January 2019, case no B5-29/18 (Miba/Zollern), paras. 364 ff. See also the corresponding information in *BKartA*, Innovations – Challenges for competition law practice, 2017, pp. 33 f.

¹⁵⁹ *Motta/Peitz*, Big Tech Mergers, Discussion Paper Series CRC TR 224, May 2020, p. 1; *Argentesi et al.*, Merger Policy in Digital Markets: An ex post Assessment, Journal of Competition Law & Economics 2020, pp. 95 ff. (131).

¹⁶⁰ *Argentesi et al.*, Ex-post Assessment of Merger Control Decisions in Digital Markets, 2019, p. 117.

of digital markets. It is held that competition authorities often focus on the users' side of multi-sided markets and neglect the other market side(s). Products or services which from the users' point of view seem complementary or unrelated could be substitutes from the other market side's perspective (such as the market for online advertising). One merger example mentioned in the assessment of which the multi-sidedness of the markets was not sufficiently taken into account is the Facebook/Instagram case.¹⁶¹

Argentesi et al. emphasise that for competition authorities to assess merger projects, the business models and monetisation strategies of digital companies have to be analysed in order to reach an exact understanding of the incentives for incumbents to acquire other companies and the consequences of such acquisitions. In their view, this is an unavoidable step in formulating a theory of harm.¹⁶²

Crémer et al. are of the opinion that in the case of digital markets the usual distinction between horizontal, vertical and conglomerate mergers is outdated. In their view, it is often difficult to exactly define markets and to accurately identify competitors and their market shares. In addition, they hold that horizontal overlaps existing at the time of the merger can often be neglected, which essentially constrains established theories of harm to possible foreclosure effects.¹⁶³ In the case of conglomerate mergers in which the parties are active in the same "technological space" or "user space", the assessment under competition law should follow the logic of the analysis of a horizontal merger. In their view, it then has to be assessed whether the merger could result in a reduction of the existing or potential competition and in the strengthening of the acquirer's market position within the "technological space" or "user space",¹⁶⁴ which in this regard could be similar to the "innovation space" approach mentioned above. They hold that especially in the case of digital ecosystems it also has to be assessed whether acquisitions of (young) companies with few horizontal overlaps could contribute to strengthening the digital ecosystem's position of power.¹⁶⁵

¹⁶¹ *Argentesi et al.*, Ex-post Assessment of Merger Control Decisions in Digital Markets, 2019, p. 117; *Argentesi et al.*, Merger Policy in Digital Markets: An ex post Assessment, Journal of Competition Law & Economics 2020, pp. 95 ff. (123); *OECD*, Start-ups, Killer Acquisitions and Merger Control, 2020, p. 28; *Schallbruch et al.*, Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft, 2019, pp. 70 f.

¹⁶² *Argentesi et al.*, Ex-post Assessment of Merger Control Decisions in Digital Markets, 2019, p. 117; *Argentesi et al.*, Merger Policy in Digital Markets: An ex post Assessment, Journal of Competition Law & Economics 2020, pp. 95 ff. (132).

¹⁶³ *Crémer et al.*, Competition policy for the digital era, 2019, p. 112.

¹⁶⁴ *Crémer et al.*, Competition policy for the digital era, 2019, p. 116.

¹⁶⁵ *Crémer et al.*, Competition policy for the digital era, 2019, pp. 121 f.; *Schallbruch et al.*, Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft, 2019, pp. 70 f.

Bourreau/de Streel argue that the guidelines for assessing tying and bundling strategies in non-horizontal mergers should be complemented in order to better take into account the characteristics of digital markets. They hold, in particular, that competition authorities should take greater account of the fact that tying and bundling strategies may prevent innovative competitors from entering the market, reduce competition due to the greater range of different products and services offered, and contribute to anti-competitive ‘envelopment’.¹⁶⁶

Many authors suggest focussing more on potential competition when assessing mergers in the digital economy.¹⁶⁷ They hold that in a dynamic, rapidly evolving market environment, potential competition is a better indicator of market power than the competitive situation existing at the time of the merger.¹⁶⁸ In their view, digital markets in particular are often characterised by competition “for the market”, i.e. the incumbent is only disciplined by the fact that actual or potential market entries could contest its market power in the future. Potential competitors are of particular value in such a market environment.¹⁶⁹ Especially when it comes to acquisitions of innovative start-ups by large digital companies and potential ‘killer acquisitions’, the assessment naturally focuses on potential competition. The suggestion presented by *Bourreau/de Streel* to focus more on the effect the merger project subject to review has on innovations in light of their great value and the risk of creating ‘kill zones’ in the digital economy follows the same line.¹⁷⁰

In connection with the suggestion to focus more on potential competition in assessing merger projects, the need to accept major uncertainties when determining counterfactuals is also expressed. In the authors’ view, theories of harm which are based on potential competition are inevitably subject to a certain degree of uncertainty.¹⁷¹

In addition, some authors call for directly examining efficiency gains in the competitive assessment of mergers and not only after an impediment to competition has been proven. The reason for this is that synergies and efficiencies could be particularly prominent with regard to mergers in the digital economy.¹⁷² It is, however, sometimes also emphasised that

¹⁶⁶ *Bourreau/de Streel*, Digital Conglomerates and EU Competition Policy, 2019, p. 29.

¹⁶⁷ *Bourreau/de Streel*, Digital Conglomerates and EU Competition Policy, 2019, pp. 26 f.; *Furman et al.*, Unlocking digital competition, 2019, p. 12; *OECD*, Start-ups, Killer Acquisitions and Merger Control, 2020, p. 3.

¹⁶⁸ *Bourreau/de Streel*, Big Tech Acquisitions, 2020, p. 16.

¹⁶⁹ *Argentesi et al.*, Ex-post Assessment of Merger Control Decisions in Digital Markets, 2019, p. 44.

¹⁷⁰ *Bourreau/de Streel*, Digital Conglomerates and EU Competition Policy, 2019, p. 32.

¹⁷¹ *Argentesi et al.*, Ex-post Assessment of Merger Control Decisions in Digital Markets, 2019, p. 118; *Argentesi et al.*, Merger Policy in Digital Markets: An ex post Assessment, *Journal of Competition Law & Economics* 2020, pp. 95 ff. (132).

¹⁷² *Bourreau/de Streel*, Big Tech Acquisitions, 2020, p. 18.

the foreclosure effects of mergers in the digital economy, which are more likely to be expected in the long run, should not be neglected due to short-term efficiency gains.¹⁷³

The suggestion to consider a longer forecast period than the two to four years¹⁷⁴ often taken into account in European case practice when assessing the impact mergers in the digital economy may have on competition – especially in the case of young target companies – is also aimed in this direction. Since establishing a new product or service on the market could take much longer in some cases, applying a forecast period that is too short risks underestimating the potential harm to competition caused by the merger.¹⁷⁵ However, the downside of a longer forecast period could be the greater uncertainty that comes with it.

Many of the arguments brought forward in the literature to demonstrate that the theories of harm have to be further developed in order to better address merger projects in the digital economy which raise competition concerns are convincing. However, one of the challenges in developing these theories is to devise the novel theories of harm in a way that makes them compatible with the principles of the applicable legal framework and the previous case law. In particular, the question arises as to whether, for example, a stronger focus on the threat to potential competition and a more forthright expression of the counterfactuals would be promising without correspondingly adjusting the required probability standard. This leads to the question of the extent to which the substantive criteria relating to mergers in the digital economy are in need of modification.

II. Suggestions for modifying the substantive criteria

In addition to developing the relevant theories of harm, various suggestions for modifying the legal framework are presented in the literature. These suggestions first concern the standard of probability to be applied in the context of assessing a merger-related significant

¹⁷³ *van den Boom/Samranchit*, Digital Ecosystem Mergers in Big Tech – A Theory of Long-Run Harm with Applications, *Journal of European Competition Law & Practice* 2022, pp. 365 ff.; *Witt*, Who's Afraid of Conglomerate Mergers?, *The Antitrust Bulletin* 2022, pp. 208 ff. (233).

¹⁷⁴ See, for example, case M.6992 – Hutchison 3G UK/Telefónica Ireland, para. 765. In the Bundeskartellamt's case practice, the forecast period usually is three to five years; the specific circumstances of the market in question can, however, justify different forecast periods (*BKartA*, Guidance on Substantive Merger Control, March 2012, para.12, fn. 11).

¹⁷⁵ *Argentesi et al.*, Ex-post Assessment of Merger Control Decisions in Digital Markets, 2019, p. 46; *Argentesi et al.*, Merger Policy in Digital Markets: An ex post Assessment, *Journal of Competition Law & Economics*, 2020 pp. 95 ff. (132); *OECD*, Start-ups, Killer Acquisitions and Merger Control, 2020, pp. 21 f.

impediment to effective competition¹⁷⁶ (1). Some authors also suggest defining additional substantive criteria for intervention specifically applicable to large digital corporations (2).

1. Amendments to the required standard of probability

According to the case law of the European Court of Justice a decision prohibiting a merger requires that a significant impediment to competition is more likely than not to occur.¹⁷⁷ Most recently the European General Court used the standard of “strong probability” to assume a significant impediment to effective competition “the existence of which is inferred from a body of evidence and indicia, and which is based on several theories of harm”.¹⁷⁸ With regard to Section 36(1) GWB, the Federal Court of Justice deems it sufficient for prohibiting a merger that a significant impediment to competition is “at least probable due to concrete circumstances” or can be expected “with some degree of probability” (translation provided by the Bundeskartellamt). It has not yet been clarified whether this means overwhelming probability or the lower standard of sufficient probability from the law of threat prevention.¹⁷⁹ However, the Federal Court of Justice rejects a “high degree of probability” for the forecast and only requires a high degree of probability as far as the “consideration of future changes to the framework conditions of competition or upcoming amendments in legislation” are concerned.¹⁸⁰

Due to the uncertainties in forecasting the effects of a concentration especially in the digital sector it is being discussed whether the requirements for the necessary degree of probability should be made more flexible. This is intended, in particular, to better address cases in which

¹⁷⁶ Determining the substantively required probability must be distinguished from the procedural question of the relevant standard of proof, which especially in the English language literature is not always clear due to the use of the term “standard of proof”. *Schallbruch et al.*, Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft, 2019, pp. 69 f., however, seem to understand the term “standard of proof” to mean the substantively required probability.

¹⁷⁷ *ECJ, Bertelsmann vs Impala*, decision of 10 July 2008, case no C-413/06 P, para. 52 (“It follows that, where it has been notified of a proposed concentration pursuant to the Regulation, the Commission is, in principle, required to adopt a position, either in the sense of approving or of prohibiting the concentration, in accordance with its assessment of the economic outcome attributable to the concentration which is most likely to ensue.”).

¹⁷⁸ *European General Court, CK Telecoms UK vs COM*, decision of 28 May 2020, case no T-399/16, para. 118 (“Thus, the standard of proof applicable in the present case is therefore stricter than that under which a significant impediment to effective competition is ‘more likely than not’, on the basis of a ‘balance of probabilities’, as the Commission maintains. By contrast, it is less strict than a standard of proof based on ‘being beyond all reasonable doubt’ [...]”); this decision has been appealed but the appeal has not yet been decided.

¹⁷⁹ See *Rasek*, comments on Federal Court of Justice, decision of 19 June 2012, case no KVR 15/11, WuW 2021, pp. 461 ff. (462).

¹⁸⁰ *Federal Court of Justice*, decision of 19 June 2012, case no KVR 15/11, paras. 18 f.; others assume that the principle of proportionality always requires a “high degree of probability [...] which is closer to certainty”, see. *Immenga/Mestmäcker-Thomas*, Wettbewerbsrecht, 2020, § 36 GWB para. 525.

an impediment to competition resulting from the merger (e.g. that the target company cannot develop into a competitor relevant to the acquirer) is only slightly likely (since, for example, the target company is not yet a competitor and its growth potential is unclear).¹⁸¹ With a view to Australian law the ACCC suggests allowing the competition authority to already intervene if an impediment to competition is “a possibility that is not remote”.¹⁸² In the USA a bill has been presented which is to lower the criterion for intervention from a “substantial lessening of competition” to “an appreciable risk of materially lessening competition”.¹⁸³

The Furman Report suggested a legislative change in British law in order to allow the competent authority to weigh up the likelihood and the magnitude of the merger’s impact on competition.¹⁸⁴ For this purpose, the harm the merger is expected to cause to competition is to be quantified in the mathematical sense of an expected value, taking into account its likelihood of occurrence, and balanced against the expected competitive benefits and their likelihood of occurrence; if the expected harm outweighs the benefits, the authority should block the merger.¹⁸⁵ Supporters of this approach point out that this suggestion could better take into account any costs associated with an incorrect forecast¹⁸⁶ and aligns the decision with consumer welfare¹⁸⁷. However, this approach is criticised for the fact that it is usually

¹⁸¹ In this respect see the similar initial situation under the general law on threat prevention in which the prevailing opinion is to apply the so-called principle of reversed proportionality (e.g. BeckOK PolR NRW-*Worms/Gusy*, § 8 PolG NRW, para. 109: “The greater the threat of harm, the lower the probability of occurrence may be, and the lower the threat of harm, the greater the probability of occurrence must be”). (Translation provided by the Bundeskartellamt)

¹⁸² ACCC, Digital Platform Services Inquiry, 2022, p. 106.

¹⁸³ Competition and Antitrust Law Enforcement Reform Act of 2021, see *Bogomolni*, Tackling Big Tech in the United States and the European Union, International Law and Politics 2021, pp. 235 ff. (241 ff.).

¹⁸⁴ *Furman et al.*, Unlocking digital competition, 2019, p. 99 (“to weigh up both the likelihood and the magnitude of the impact of the merger”).

¹⁸⁵ *Furman et al.*, Unlocking digital competition, 2019, p. 99 (“This would mean mergers being blocked when they are expected to do more harm than good”, para. 17: “This means ‘expected’ in the mathematical sense, so based on the chance of an outcome and its value. For example, if facing a bet where a person has a one in three chance of losing £150 and a two in three chance of winning £30 they should not take the bet – because although they are most likely to win £30, the bad outcome is a lot worse: the ‘expected’ value is minus £30 (30/3+30/3-150/3).”).

¹⁸⁶ *Bourreau/de Streel*, Big Tech Acquisitions, 2020, pp. 19 f. (“When the costs of errors are important, neglecting them can be harmful to consumer welfare. This may be particularly the case in the digital sector where markets tip quickly, meaning that the costs of type II errors may be very high. [...] In practice, this means that if the acquisition of a small start-up by a big tech firm would eliminate a credible probability, even small, that such start-up could become an effective competitor to the big tech acquirer, allowing such merger will eliminate the potential benefits, which may be important, of having more competition [...]. As the costs of making a type II error may be important, they should be taken into account and may lead to the prohibition of the merger or to the imposition of remedies.”).

¹⁸⁷ *Motta/Peitz*, Big Tech Mergers, Discussion Paper Series CRC TR 224, May 2020, pp. 35 f. (“Therefore, the relevant criterion should be that the expected gains in consumer welfare from competition are larger than the gains that would come from the upgraded offer of the merging firm”).

impossible to precisely quantify the costs and benefits of a merger and the associated likelihood of their occurrence.¹⁸⁸ Some authors hold that the approach therefore affords the competition authority a scope of assessment which is difficult to review in court.¹⁸⁹

The CMA in particular has taken a stance against the suggestion presented in the Furman Report. In its view, the approach is theoretically an “attractive way” but at present it is assumed that it is not possible to apply this approach “in a transparent and robust way”.¹⁹⁰ As an alternative, the CMA suggests using a lower standard of probability which already allows blocking a merger if there is a “realistic prospect” of an impediment to competition.¹⁹¹ This should be the same standard of probability on which the CMA bases its decisions on whether to initiate second phase proceedings while the second phase proceedings themselves should remain unaffected by this change.¹⁹²

The CMA’s suggestion proposes a remarkable way to address the uncertainties in forecasting the effects of a merger predominant in the digital sector. This applies in particular to scenarios which regularly occur with regard to mergers involving large digital corporations in which potentially far-reaching harm to competition can only be forecast with a rather low degree of probability due to the dynamic nature of the digital sector. It therefore seems reasonable to introduce legislative modifications, even if only for a limited circle of addressees, but at least

¹⁸⁸ *Levy/Mostyn/Buzata*, Reforming EU merger control to capture ‘killer acquisitions’, *Competition Law Journal* 2020, pp. 51 ff. (62); *Schallbruch et al.*, Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft, 2019, p. 70.

¹⁸⁹ *Schallbruch et al.*, Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft, 2019, p. 70; the authors rather emphasise that an approach is needed which is based on “relatively simple and clear, economically sound criteria and principles” (loc.cit.). (Translation provided by the Bundeskartellamt) They therefore suggest that particular importance should be attached to the degree of the acquirer’s market power. An impediment to competition should already exist if a merger noticeably reduces the contestability of a consolidated position of power held by the acquirer without having to prove an overwhelming probability of success of a possible attack (loc. cit., see also *Federico/Scott Morton/Shapiro*, *Antitrust and Innovation: Welcoming and Protecting Distribution*, 2019, p. 12).

¹⁹⁰ CMA, A new pro-competition regime for digital markets, 2020, pp. 63 f.

¹⁹¹ CMA, A new pro-competition regime for digital markets, 2020, p. 63. The British Government under Boris Johnson had meanwhile turned down the suggestion (Government response to the consultation on a new pro-competition regime for digital markets, May 2022, p. 34: “The government will not take forward any Phase 2 merger intervention threshold changes”).

¹⁹² CMA, A new pro-competition regime for digital markets, 2020, p. 63; CMA, A new pro-competition regime for digital markets. Appendix F, 2020, pp. F30 f. (“The Enterprise Act 2002 does not specify a particular threshold in this regard, but states that the CMA must refer a merger for a phase 2 investigation if it believes that it is or ‘may’ be the case that a merger ‘may’ be expected to result in an SLC. [...] The test is described in the CMA’s guidance as a ‘reasonable belief, objectively justified by relevant facts, as to whether or not it is or may be the case that the merger has resulted, or may be expected to result, in an SLC’. The guidance further explains that this is a finding at a ‘lower range of probability’ than the balance of probabilities standard, where the ‘relevant likelihood’ of an SLC is ‘greater than fanciful, but below 50%.’”).

for companies designated under Section 19a(1) GWB. With regard to these companies the abstract threat resulting from their position as companies of paramount significance for competition across markets justifies lowering the intervention threshold. Even according to this approach, the mere possibility of a significant impediment to effective competition would not be sufficient to block a merger.

2. Additional standards for assessing mergers involving large digital companies

In some of the literature it is also suggested¹⁹³ that additional criteria for prohibiting mergers should be created for the assessment of mergers involving large digital companies. In this respect, a specifying prohibition criterion could be introduced for companies designated under Section 19a(1) GWB. This criterion would complement the established prohibition criterion of a significant impediment to effective competition and could explicitly address cases in which mergers significantly strengthen cross-market positions within the meaning of Section 19(1) GWB. Disproportionate interventions would already be ruled out by particularly requiring a *significant* strengthening of a position. In addition, pro-competitive aspects resulting from a merger could already be taken into account in the context of the existing balancing clause. This clause is de lege lata applied across markets so that any competitive improvements resulting from the merger can be sufficiently taken into account.

In addition to introducing a specifying prohibition criterion, it is also possible to consider modifying the existing examples of delimitation given for the creation or strengthening of a dominant position. For German law it is thus conceivable, for example, to enshrine the vertical integration of a company and its activity in otherwise related markets as an example in Section 18(3) GWB in order to clarify that this idea of an ecosystem may have to be taken into account in assessing a company's market position.

III. Suggestions for modifying the relevant law of evidence

In addition to changing the substantive conditions for prohibiting a merger, there are also a number of suggestions for making it easier to prove that the conditions for prohibition have been met by introducing a presumption criterion or reversing the burden of proof, at least for mergers involving large digital companies.¹⁹⁴ The consequence of these approaches would be

¹⁹³ Podszun, *Empfiehl sich eine stärkere Regulierung von Online-Plattformen und anderen Digitalunternehmen?*, 2020, p. 84.

¹⁹⁴ ACCC, *Digital Platform Services Inquiry*, 2022, pp. 106 f.; *Crémer et al.*, *Competition policy for the digital era*, 2019, p. 124; *Motta/Peitz*, *Big Tech Mergers*, Discussion Paper Series CRC TR 224, May 2020, p. 35; *Scott Morton et al.*, *Stigler Committee on Digital Platforms. Report*, 2019, p. 98; *Turgo*, *Killer Acquisitions in Digital Markets*, CoRe 2021, pp. 112 ff. (117); see also the bill for a Platform Competition & Opportunity Act in the USA, which provides for the reversal of the burden of proof with regard to certain digital

that the parties to the merger would have to demonstrate and prove that the merger will not significantly impede competition.¹⁹⁵ In some cases, the range of conditions under which an acquisition should still be possible is also further restricted. For example, it is demanded that the parties must be able to demonstrate and prove that the transaction serves the public interest and that similar benefits cannot be achieved through internal growth and expansion.¹⁹⁶ The justification provided for this is, in particular, the fact that there are considerable asymmetries in resources and information available to the large digital companies and the competition authorities.¹⁹⁷

However, the argument brought forward against these proposals is that it could still be assumed that the majority of mergers involving large digital companies are unlikely to have negative effects on consumers, or even have positive effects on them.¹⁹⁸ If small, young companies thus had to fear greater difficulties if they wanted to be acquired by large digital companies as part of their exit strategy, this could also reduce the willingness of venture capitalists to invest in risky projects.¹⁹⁹ In addition, making it significantly more difficult to acquire or sell the target company would involve a potentially disproportionate encroachment on fundamental rights.²⁰⁰

platforms, and France's proposal to reverse the burden of proof in digital deals (<https://globalcompetitionreview.com/article/france-proposes-reversing-burden-of-proof-in-digital-deals>).

¹⁹⁵ *Scott Morton et al.*, Stigler Committee on Digital Platforms. Report, 2019, p. 98 ("Mergers between dominant firms and substantial competitors or uniquely likely future competitors should be presumed to be unlawful, subject to rebuttal by defendants."); *Turgo*, Killer Acquisitions in Digital Markets, CoRe 2021, pp. 112 ff. (117) ("[...] all acquisitions of promising start-ups by dominant digital operators would be presumed to be anti-competitive, unless the parties prove that the transaction would bring significant efficiency gains.").

¹⁹⁶ *Nadler/Cicilline*, Investigation of competition in digital markets, 2020, p. 388 ("Under this change, any acquisition by a dominant platform would be presumed anticompetitive unless the merging parties could show that the transaction was necessary for serving the public interest and that similar benefits could not be achieved through internal growth and expansion").

¹⁹⁷ *Scott Morton et al.*, Stigler Committee on Digital Platforms. Report, 2019, pp. 98 ff. ("[...] it would shift the burden to the party with the best access to relevant information on issues of competitive effects and efficiencies from the merger"); *Bourreau/de Streel*, Big Tech Acquisitions, 2020, p. 20.

¹⁹⁸ *Furman et al.*, Unlocking digital competition, 2019, p. 101; *Levy/Mostyn/Buzata*, Reforming EU merger control to capture 'killer acquisitions', *Competition Law Journal* 2020, pp. 51 ff. (62 ff.).

¹⁹⁹ *Furman et al.*, Unlocking digital competition, 2019, p. 101; *Levy/Mostyn/Buzata*, Reforming EU merger control to capture 'killer acquisitions', *Competition Law Journal* 2020, pp. 51 ff. (63 f.), *Parker/Petropoulos/van Alstyne*, Platform mergers and antitrust, *Industrial and Corporate Change* 2021, pp. 1 ff. (22).

²⁰⁰ *CMA*, A new pro-competition regime for digital markets, 2020, p. 101 ("A presumption against all acquisitions by large digital companies is not a proportionate response to the challenges posed by the digital economy"); *Levy/Mostyn/Buzata*, Reforming EU merger control to capture 'killer acquisitions', *Competition Law Journal* 2020, pp. 51 ff. (64); *Rizzo*, Digital Mergers, *JECLP* 2021, pp. 4 ff. (13) ("presumption against all transactions by leading technology firms would not be proportionate.");

However, at least in the case of acquisitions by a company designated under Section 19a(1) GWB, it can be argued in favour of reversing the burden of proof that based on the designation a special threat to competition arising from the acquiring company has already been established. In this way, the effectiveness of merger control in cases involving such companies could be ensured under procedural law. The exact terms and scope of a reversal of the burden of proof would then have to be further discussed in the light of and depending on any possible parallel changes to the substantive standard of probability (see C.II.1 above).

Podszun, *Empfiehl sich eine stärkere Regulierung von Online-Plattformen und anderen Digitalunternehmen?*, 2020, p. 85 (“constitutional concerns”). (Translation provided by the Bundeskartellamt)

D. Conclusion

Overall, it can be seen that in recent years a large number of merger projects involving large digital corporations were either not subject to control by competition authorities or had to be cleared without restrictions. In conjunction with the tendencies towards concentration existing in the digital sector the impression of significant underenforcement remains against this backdrop. In the light of the courts' recent tendency to set high standards for establishing the existence of a significant impediment to effective competition outside of the already established theories of harm, waiting for the case law to develop based on numerous individual cases does not appear suitable to meet the challenges posed by the rapidly developing digital economy.

The German and European legislators have so far focused on developing the legal framework for addressing potentially abusive conduct in the digital sector. In view of the potentials associated with preventive merger control for averting (further) concentrations of power in the digital sector, there is much to be said for also tightening the legal framework of merger control.

With regard to German law and to supplement the transaction value threshold, which has existed since the 9th amendment to the GWB, consideration should be given to further developing the criteria determining whether a merger is subject to merger control, especially also with regard to large digital corporations. In this way, it would be possible to extend German merger control to all merger projects involving a company which has been found to be of paramount significance across markets within the meaning of Section 19a(1) GWB.

The need for developing the relevant theories of harm has first become clear with regard to the substantive criteria for prohibiting a merger. This is in particular to ensure that the impact the acquisition of young companies has on potential competition and the competitive effects of integrating additional services into an existing digital ecosystem are adequately covered. The challenge in this regard is, however, to ensure the compatibility of new theories of harm with the current legal situation and case law. Against this backdrop, it seems logical to also develop the legislative criteria for intervention. For companies which have been found to be of paramount significance across markets pursuant to Section 19a(1) GWB, for example, the relevant probability standard for proving a significant impediment to effective competition could be lowered. The effectiveness of merger control could also be ensured with regard to such companies by adjusting the burden of proof under procedural law. In addition, a further complementary criterion could be introduced which allows the prohibition of such mergers which are expected to significantly strengthen a company's paramount significance across markets as determined under Section 19a(1) GWB.

E. Questions for discussion

1. Have the competition authorities so far taken sufficient account of the particularities of mergers in the digital economy?
2. Is it necessary to modify the size-related criteria of the formal conditions for prohibiting a merger?
3. To what extent can digital mergers be sufficiently captured by the COM's new referral practice or the corresponding case law regarding Article 22 ECMR?
4. Should companies designated under Section 19a(1) GWB be subject to a separate obligation to inform competition authorities of mergers with the authorities' possibility to examine a case or an extended obligation to notify a merger?
5. To what extent is the SIEC test capable of capturing all problematic merger cases in the digital economy?
6. To what extent do the established theories of harm have to be revised or new theories of harm developed?
7. Should the standard of probability used to prove a significant impediment to effective competition be adjusted? Should, for example, a degree of probability of occurrence of an impediment to competition that is lower than for other mergers be sufficient to prohibit a merger involving a company designated under Section 19a(1) GWB?
8. Should a reversal of the burden of proof to the detriment of the parties be introduced for mergers involving a company designated under Section 19a(1) GWB?
9. Is it appropriate to introduce legislative additions in the GWB to also explicitly cover the strengthening of a paramount significance across markets of a company designated under Section 19a(1) GWB?