Digital data-driven mergers: is data sharing remedy a panaceum?

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Agenda

1. Understanding data-driven mergers
2. Harm stemming from digital data-driven mergers
3. Data-access remedies in the Commission’s merger control practice
4. Big Tech's mergers as a challenge to data-access remedies
5. Shaping potential data-sharing remedy in digital data-driven mergers
6. Conclusions

Data-driven mergers

- Transactions, which are motivated by acquisition of huge amount of data.
  - They relate to business models in which data stem from the continuous interaction with existing and potential customers or machine-generated data.

Efficiencies, but also…

exploitation and exclusion.

Examples of data-driven mergers

Meta/WhatsApp, Google/DoubleClick, Microsoft/Skype, Apple/Shazam, Microsoft/Yahoo

How about harm in non-digital data-related mergers?

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Horizontal – elimination of competition between two leading data suppliers and reduction the choices of customers

Vertical – foreclosure of competitors by increasing prices for market data distributed via redistributors or by limiting the access to such data that are integrated in its own products

Foreclosure
of competitors
in the vertically affected market
for multimodal integrator apps

Harm stemming from digital data-driven mergers

Data concentration as advantage in advertising markets

- Google/DoubleClick
- Microsoft/LinkedIn
- Microsoft/Yahoo
- Google/Fitbit
- Meta/Kustomer

Data advantage for improving existing or developing new products

- Apple/Shazam
- Microsoft/LinkedIn

Data and input foreclosure

- Microsoft/GitHub
- Google/Fitbit
- Meta/Kustomer

Privacy degradation

- Apple/Shazam
- Microsoft/LinkedIn
- Meta/WhatsApp

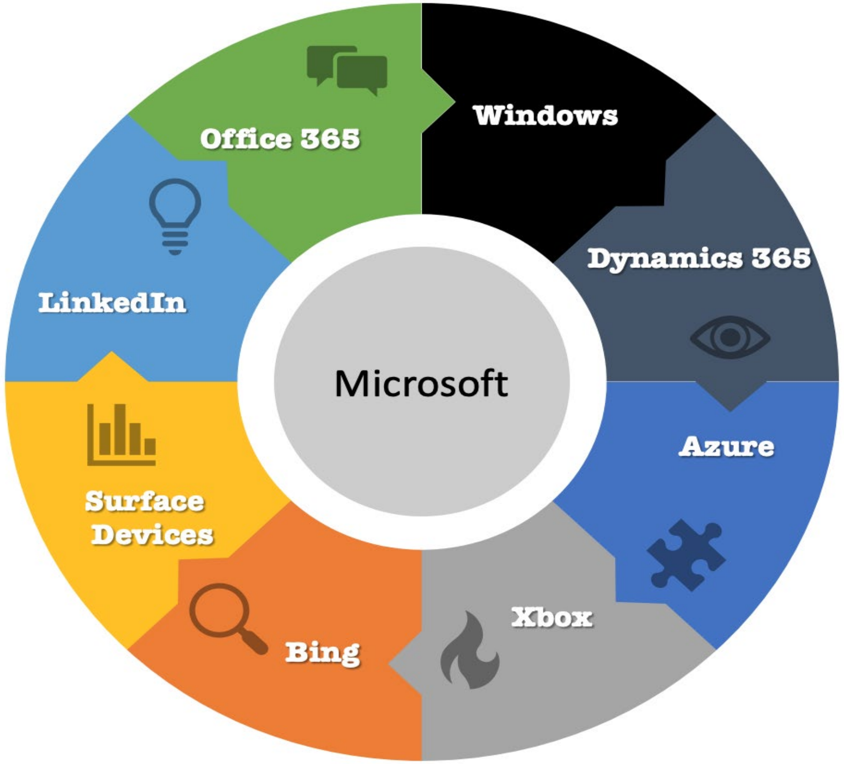
What about digital conglomerates?

Microsoft's subsidiaries' relevant product markets (examples):

- general search engine (Bing);
- work group server operating systems (Windows);
- professional social networking (PSN) services (LinkedIn).

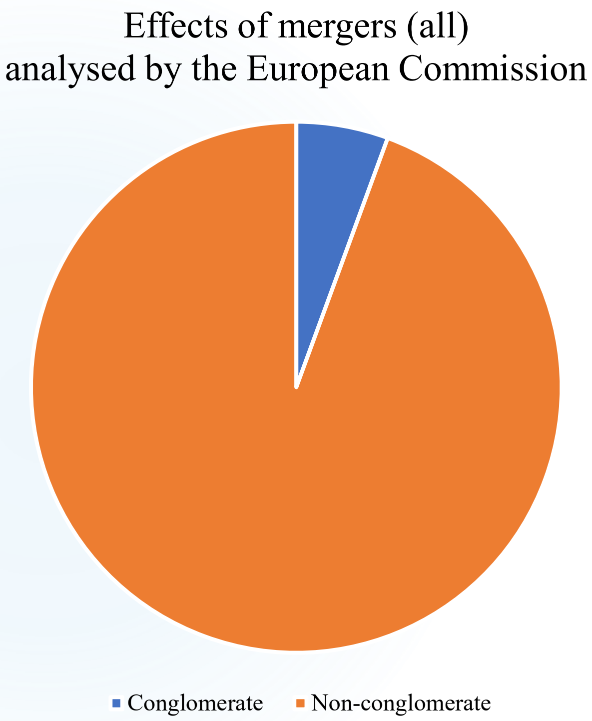
→ Do not compete, **but…**

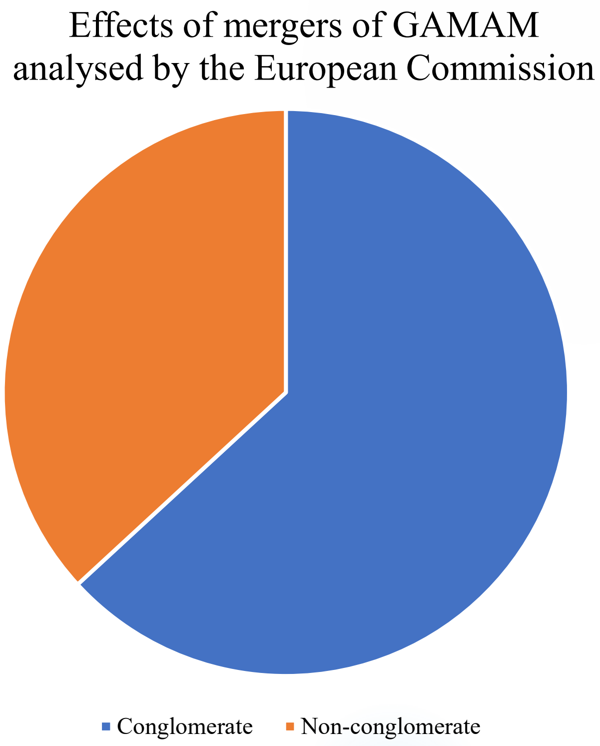
in digital sector **economic value** is increased in very complex and dynamic value networks.



Conglomerate effects – ‚any competition problem' for the EC?

Conglomerate mergers in the majority of circumstances
will not lead to any competition problems
(para. 92 of Non-Horizontal Guidelines)





Source: own study

Ecosystem aspect of harm in digital mergers

The mere accumulation of data may create an advantage that increases the risk of further anti-competitive behaviour.

Fact

The gap between the Big Tech's resources to exploit the data containing the valuable information to compete in the market(s) versus the ones of the following (actual or potential) competitors.

Problem

- Economies of scale
- Economies of scope
- Network externalities
- Skewed pricing
- Positive feedback loop
- First mover advantage
- Switching costs
- Winner takes all

What does the Commission say? - Google/DoubleClick

1 Recognision of effects of mere accumulation of data

In view of its large scale and access to CPI, the network of the new entity would be protected by high barriers to entry as no other network would be able to reach a similar size, in particular with the disadvantage of not having access to the same amount of data on users (para. 290).

2 Recognision a level of competition that goes beyond specific relevant markets

As the network of the merged entity would become larger and "information-richer", it would attract more publishers and more advertisers up to the point where the market would "tip" in favour of the network of the merged entity, enabling it to raise the price of its offering (para. 290).

3 But finally…unconditional clearance

Even if Google's and DoubleClick's data collections were available as input for DoubleClick it would therefore be unlikely that its competitiveness would be enhanced in a way that would confer on the merged entity a competitive advantage that could not be matched by its competitors (para. 364).

Release of the data specific competition analysis from a market-specific orientation - Meta/Kustomer

Bundeskartellamt

Both the data advantage and the possibility to further develop Meta’s own services could affect the Meta ecosystem as a whole and indirectly also the area of social media online advertising, in which Meta already has at least a very prominent position.

The question arises…

how to remedy harm, if:

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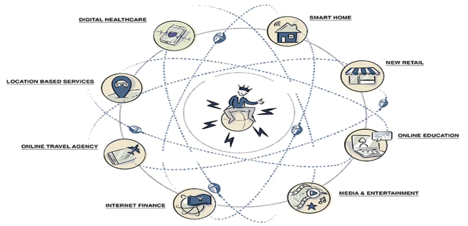
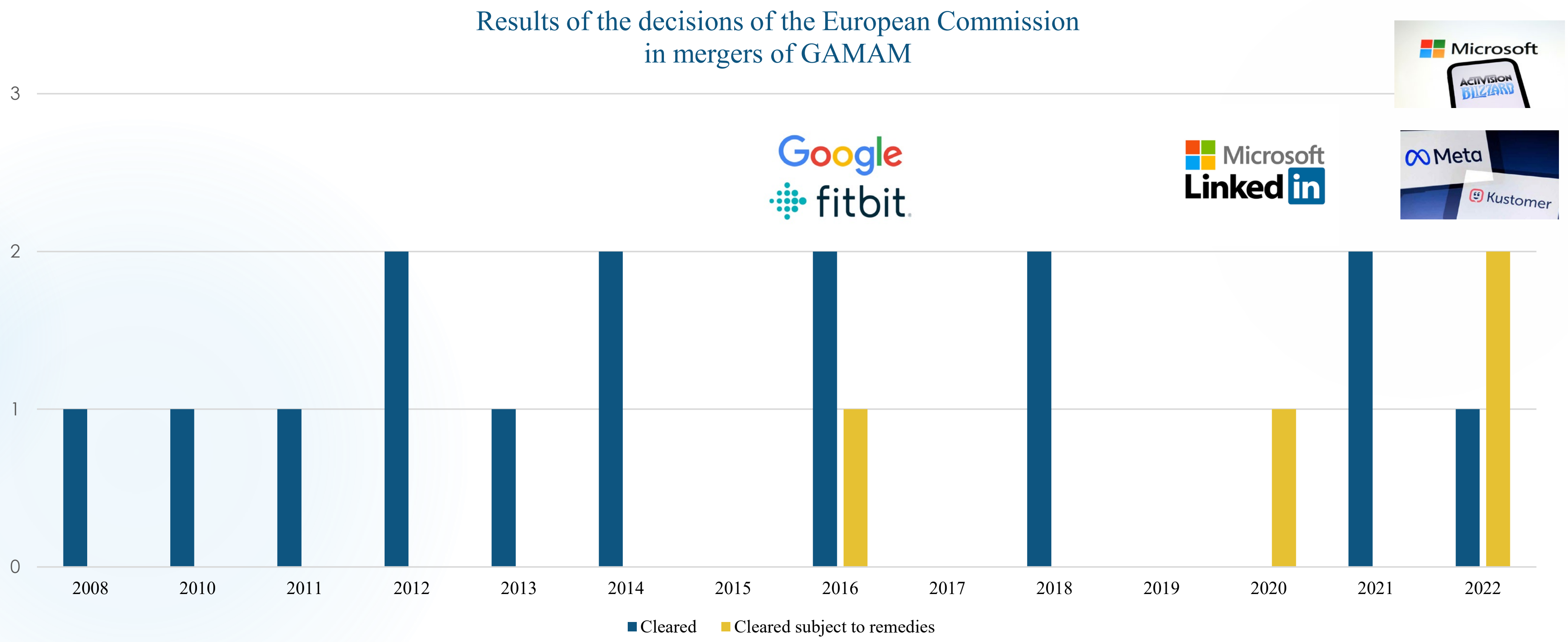
1) potential anticompetitive effects that stem from the aggregation of data can affect multiple markets where the merged undertaking is active;



2) it is difficult to impose effective and proportionate remedies in such highly dynamic, disruptive markets.

Remedies in digital mergers



Source: own study

Data-access as a remedy in merger control cases – the Commission's practice

Sector of merging parties	Digital mergers			Non-digital mergers	
Data-access remedy	Guarantee (for 10 years) of free and non-discriminatory access to its APIs for messaging channels to CRM software providers and new entrants that compete with Kustomer's CRM software; guarantee of access, for 10 years, to improvements of the feautres and functionalities of Kustomer's messaging services	Granting competing professional social network service providers access to ‚Microsoft Graph', a gateway for software developers	Access to API for 10 years, subject to user consent and without charge for access under further specified conditions	Provision of an API enabling third-party aggregator platforms for mobility solutions to access mobility data on request and therefore allowing such platforms to display certain Information (limited to six cities and lasts three years)	Sell of a copy of four databases relevant for the parties' economic activities

Decision of the European Commission of 27 January 2022, Meta/Kustomer, M.10262.

Decision of the European Commission of 6 December 2016, Microsoft/Linkedin, M.8124.

Decision of the European Commission of 17 December 2020, Google/Fitbit, M.9660.

Decision of the European Commission of 7 November 2018, BMW/Daimler/Car Sharing JV, M.8744.

Decision of the European Commission of 19 February 2008, Thomson/Reuters, M.4726.

Conditional data sharing remedy

Such a remedy would only apply if certain circumstances occur.

Assessment of SIEC was dependent on specific circumstances that could already be identified but could not be clearly assessed by the Commission as it was also dependent on future circumstances, i.e. market developments and the usage of specific data.

The Commission invoked dynamic nature of digital sector in order to ‚justify' unconditional clearance of a merger, stating that in digital sector high market shares are not necessarily indicative of market power and, therefore, of lasting damage to competition.

Conditions of conditional data sharing remedy

Applicable to non-exclusive and non-market specific information contained in data

How to avoid creation of ‚erga omnes' right?

Conditions

(i) data-asymmetry between the merged entity and a competitor (also potential or future);

ii) inability to obtain such data anywhere else.

Conclusions

None of data driven mergers was blocked by the Commission. However, there is a rise of analysis of conglomerate effects in digital data-driven mergers.

An adequate (ecosystem) theory of harm would allow the Commission to impose effective remedies or even prohibit the merger. However, the second scenario seems to be highly difficult due to the nature of digital sector, i.e. its dynamics and unpredictability. Therefore, remedies play a role.

If data accumulation is one of the key factors influencing Big Tech's market power and leading to creation of digital conglomerates, there arises a question whether data sharing can remedy potential SIEC.

The Commission analyses data-driven mergers of Big Tech through 'traditional' market-oriented lenses. However, as cases such as Meta/Whatsapp or Google/Doubleclick show, different attitude of relevant market assessment should be considered, because potential anticompetitive effects that stem from the aggregation of data can affect multiple markets where the merged undertaking is active.

Data-sharing remedy is not a panaceum. It can be a helpful tool of the Commission, but it should be adjusted to dynamics of digital sector.

An idea could be to impose a conditional data-sharing remedy, which would only be applicable if some circumstances occur. In order to avoid creating 'erga omnes' right, conditions that could be imposed in order to take advantage of such data-sharing remedy by a competitor of a merged undertaking could be (i) data-asymmetry between the merged entity and a competitor (also potential or future) competitor and (ii) inability to obtain such data anywhere else.

Thank you for your attention.

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