Chapter III

THE RETURN OF THE CONGLOMERATE

Ass. Prof. Dr. Carmen Herrero Suárez
University of Valladolid

ABSTRACT: In the last decade, there has been a resurgence of interest in conglomerate effects in response to the growing importance of digital ecosystems, and some recent conglomerate mergers in the digital sector. To understand the scope of this debate and to assess whether we are facing a paradigm shift and, if so, how far-reaching, in this work we analyze how the treatment of conglomerate mergers and the business structures resulting from these operations has evolved, both in the US and in Europe and the challenges ahead.
Keywords: Conglomerate, mergers, leverage, tying, ecosystems.

I. THE DUSTING-OFF OF AN ALMOST FORGOTTEN CONCERN: CONGLOMERATE MERGERS

Since their very birth, few branches of the legal system have been subject, to as many discussions on their functionality and objectives as competition law. This is an essentially changing and malleable area of law, which has alternated throughout its history stages of intense and more relaxed application. Various factors of the most varied nature (economic, political, social) explain the continuous questioning of the scope and purpose of competition law. The intimate connection of this sector of the legal system with the free market model of economic organisation determines that the attacks this one suffers also have repercussions on the former. Times of confidence in the self-correcting capacity of the market to take care of its own failures and imperfections are usually accompanied by a relaxation in the application of competition law and, on the contrary, greater suspicion of the possibilities of self-correction or market recovery calls for more incisive public intervention, through these rules for monitoring the actions of economic operators.

We are currently witnessing one of these stages of invigoration of the antitrust rules and the reopening of a debate —which, it now becomes clear, had only been dormant— on not only the interpretation and functionality of the parameters in force in recent decades for assessing harm to competition but even on the ultimate objectives of this area of law.

What is the reason for this renewed interest in competition law?

In Western economies, a gradual increase in the degree of market concentration has been observed in recent decades, together with the emergence and consolidation of firms with significant positions of economic power. This scenario has given rise to long-standing concerns that this increase in concentration could lead to a deterioration of the competitive process. Moreover, the most alarmist positions go even further, warning about the relationship between concentration, the growing increase in economic and social inequalities and even the very affectation of political democracy.

The trend in many of these markets is as follows: concentration among the incumbents, a drastic decrease in new entry and entrenchment of the incumbents in the markets and a progressive increase in their profits.

Although the sectors or industries affected are numerous (financial markets, airlines, telecommunications, pharmaceuticals, health markets, etc.), one of the most visible manifestations of this trend towards concentration and the formation of mega-companies or business giants is undoubtedly to be found in the digital markets. It is precisely the emergence and, above all, the fortification of large technology platforms that has triggered alarm and sudden awareness of the structural changes taking place in the markets[1].

1. Vid. HERRERO, C: «Gigantismo empresarial en los mercados digitales: Una vuelta a los orígenes y. ..nuevos desafíos?», *Revista Estudios Europeos*, n°78, July-December, 2021, pp. 111-124; IDEM: «La recuperación de las preocupaciones estructurales. La sentencia *Towercast* y la vuelta de Continental Can», *Cuadernos de Derecho Transnacional*, volume 15, n. 2, 2023, pp. 629-649 and bibliography cited therein.

This atmosphere of growing concern about oligopolisation or monopolisation of markets has led all eyes to turn to competition policy, which has been questioned for its role in this development and debated for its future role in addressing it.

The recovery of structural concerns determines that the review, although it is projected on all aspects of antitrust law, has a particular incidence on the sector specifically oriented to the control of structures, that is, the rules on concentrations between companies. As the standards and policies in force, the result of the triumph of liberal ideas, dominant with more or less nuances, since the 1980s, have not managed to halt this situation of concentration, we are now contemplating the return of old objectives and theories that were once cornered, or even directly discarded.

Perhaps no other concern is more expressive of the fear of private economic power and the formation of corporate giants in the markets than that derived from the conglomerate effects of corporate external growth operations. Primarily in the US during the 1960s and 1970s, various theories of the potential harm to competition that could result from conglomerate mergers were developed. These theories have also been used by the European competition authorities in the design of the much later European merger policy.

However, from the 1980s onwards, the triumph of the liberal ideas of the Chicago School and the change in the standard for assessing harm to competition led to the total disappearance of conglomerate mergers from antitrust policy in the US. In Europe, although it is not possible to speak of a similar elimination because conglomerate mergers have always been present in practice or, if not, at least in the Commission's guidelines, there was a certain «hibernation» of fears in relation to these operations at the beginning of the 21st century, when not only are these concentrations not going to be a priority on the agenda of the European authority, but also many voices are going to defend their harmlessness.

As we will have the opportunity to examine in detail throughout this paper, the last decade has seen a rentrée of conglomerate mergers on the antitrust scene, driven mainly by the special structural configuration of digital markets.

Before entering into the analysis of this reopened debate, it is convenient to delimit what is meant by conglomerate concentration, given that, depending on the jurisdiction, this concept may have a different scope.

In this sense, if horizontal mergers can be defined as those that take place between parties operating in the same economic stage and vertical mergers as the union between economic agents operating in successive economic stages, conglomerate mergers can be delimited negatively, covering all those cases of union between companies that do not fall into the previous categories. In this

sense, the CFI has defined them as «mergers of undertakings in which there was, prior to the transaction, no competitive relationship, either as direct competitors or as suppliers or customers[2] «and in a practically identical way, they are defined in the *Guidelines for the assessment of non-horizontal mergers*[3], as: «mergers between undertakings whose relationship is neither horizontal (as competitors in the same relevant market) nor vertical (as suppliers or customers)». This definition, therefore, excludes from the concept of a conglomerate merger transactions between undertakings with pre-existing horizontal or vertical links, irrespective of whether this link is actual or merely potential.

However, in some legal systems, such as the US, a merger between potential competitors was traditionally considered a form of conglomerate merger[4]. This conception has now been abandoned, given the similar competitive impact of mergers between existing competitors and mergers between firms, which, although not currently competing, could do so in the short or medium term. Both lead to a decrease in competition between the merging firms and an increase in the level of concentration in the relevant market. In contrast, in the case of vertical and conglomerate mergers, competitive injury occurs between the merged entity and third parties operating in different markets. Therefore, at this stage, transactions between potential competitors fall under the category of horizontal mergers, and the assessment of their conformity with competition law follows the same analytical parameters.

Despite these exclusions, the category of conglomerate mergers is very vast, ranging from the union of firms active in unrelated economic sectors (pure conglomerates) to the merger of firms active in related or neighbouring product markets, either because they are complementary or because they share the same customer base[5]. However, at least from a competition law perspective, there is some consensus on the harmlessness of pure conglomerates. In this sense, the *Guidelines for the assessment of non-horizontal mergers* expressly state, concerning the parameters that should inform the evaluation of conglomerate transactions, that they refer exclusively to mergers between companies operating in closely related markets, such as those involving suppliers of complementary products or products belonging to the same range[6].

In any event, it should be noted that this distinction between horizontal, vertical and conglomerate mergers works best in traditional or brick-and-mortar markets but may be more blurry in other types of markets, especially in digital

2. CFI Judgment of 25/10/2002, case T-5/02 *Tetra Laval v. Commission*.

3. *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings* (2008/C265/07).

4. See *ad.ex. FTC v. Procter&Gamble,* 386 U.S. 568 (1967).

5. The OECD notes that in the case of conglomerate mergers, the products of the merging firms may be complements, weak substitutes or unrelated products. OECD: *Roundtable on Conglomerate Effects of Mergers. Background Note by the Secretariat* (2020).

6. *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings* (2008/C265/07).

markets. The fragility of these boundary walls has been highlighted in the Commission's practice, for example, in the merger between Microsoft and Linkedn, where it was difficult to determine whether Linkend was or not an input for the Microsoft system and the merger should be considered of a vertical nature or, on the contrary, whether it should be categorised as conglomeral since Microsoft had not previously offered professional networking services and was extending its activities to a new market[7].

This difficulty has explicitly been taken into account in the very recent *Notice on relevant markets*[8] which points out in its paragraph 104, that, in certain circumstances, (digital) ecosystems may be considered to consist of one main primary product and several secondary (digital) products whose consumption is linked to the main product, for instance by interoperability or technological links. Where secondary (digital) products are offered as a bundle, the Commission may also assess the possibility for such a bundle to constitute a relevant market on its own.

Secondly, in most cases, mergers do not fit neatly into any of these three categories, but may have elements of all of them. Hence the term conglomerate merger, in the practice of the competition authorities, is commonly y used to refer to mergers that are either purely conglomerate (i.e. with no horizontal or vertical linkages), as well as to the conglomerate component of more complex mergers (ad.ex. the decisions in the Microsoft/Linkedn or GE/Honeywell cases).

The reappearance of these types of mergers in antitrust policy has so far taken place, without prejudice to some exceptions on a more theoretical than practical level, with the succession of a series of analytical documents, minor regulatory reforms and doctrinal contributions on old and new theories of the harm of conglomerate mergers. To understand the scope of this debate and to assess whether we are facing a paradigm shift and, if so, how far-reaching it is essential to look back and understand how the treatment of conglomerate mergers and the business structures resulting from these operations has evolved, both in the US and in Europe.

II. THE TRADITIONAL ROLE OF CONGLOMERATE EFFECTS IN MERGER POLICY

A. USA: Early abandonment of conglomerate concerns

There was a time when a specific form of business organisation, the conglomerate, reigned supreme in US markets. The 1960s and 1970s witnessed the

7. WITT, A. C.: «Who's Afraid of Conglomerate Mergers?», 67, 2, *Antitrust Bulletin,* 2022, p.3.

8. *Commission Notice on the definition of relevant market for the purposes of EU competition law*. C(2023) 6789 final.

triumph of large multi-industry groups, composed of companies belonging to different sectors of activity or branches of business, as opposed to other forms of organisation, such as companies specialising in a particular sector[9].

The fundamental motivation for resorting to these structures was the search for diversification, seen as a guarantee of a reduction of the overall business risk, which was thus intended to be limited to one of the business lines. The preferred instrument for their creation and growth was the acquisition of companies already operating in the various economic sectors.

After World War II, US markets experienced a wave of concentrations that would lead to the awakening of social concerns, which had been dormant during the war, about the concentration of economic power in the hands of a few companies. The role that the Konzerne in Germany and the Zaibatsu in Japan had played in the consolidation of authoritarian regimes unleashed long-standing concerns about the threat to the functioning of political democracy posed by the accumulation of economic power in the hands of private economic actors. These sentiments informed the passage of the Celler Kefauver Ammendment Act of 1950, which amends section 7 of the Clayton Act of 1914, intensifying control over mergers. The fundamental objective pursued through this reform was the preservation of a market of small, independent economic units, a decentralised system in which there would be no situations of economic power likely to upset the democratic balance.

The administrative and judicial application of antitrust law during the 1960s and 1970s was faithful to this task and is mainly manifested in the policy on merger control, with greater rigour in applying the antitrust law to these operations. Strictness reached not only horizontal and vertical mergers but also extended to conglomerate operations[10].

The renewed suspicion of the concentration of private economic power will project onto the large conglomerates, the new giants of the American economy, operating in various markets and with significant financial capacity, and therefore on the operations that led to their formation and growth.

In fact, in 1968, the DOJ issued the first merger guidelines in order to familiarise the business community, legal agencies and other interested groups and individuals with the standards to be applied by the Department of Justice in

9. See DAVIS, G.F./DIEKMANN, K. A./TINSLEY, C. H.: «The Decline and Fall of the Conglomerate Firm in the 1980s: The Deinstitutionalization of an Organizational Form», 59, 4, *American Sociological Review*, 1994, p. 547, who point out that in 1980, less than 25% of the 500 largest companies on the Forbes list operated in a single market.

10. Moreover, precisely the decrease in the number of horizontal mergers as a consequence of the stricter application of Section 7 of the Clayton Act led the agencies in the late 1960s to focus on other types of restructuring operations of a vertical or conglomerate nature, which had been receiving less attention. WITT: «Who's afraid of conglomerate mergers...», *cit.*, p.4, quoting then FTC Commissioner Reilly: «Continuing to empathise action against horizontal mergers would be like mounting a vast hunting expedition for stalking the dinosaur. He just isn't there anymore. On the other hand, it seems difficult to deny that enforcement activity is lagging in the major problem area, conglomerate mergers».

determining whether to challenge corporate acquisitions and mergers under Section 7 of the Clayton Act. These early guidelines expressly contemplated the three categories of mergers: horizontal, vertical and conglomerate, all of which were considered likely to harm the competitive process and lead to an increase in the degree of concentration in the markets[11].

Thus, during the decade between 1965 and 1975, several operations of this nature were banned, mainly based on three types of concerns or theories about their possible anti-competitive effects, explicitly set out in the Guidelines.

On the one hand, taking into account the broad concept of conglomerate merger used in the Guidelines, which includes in this category transactions between undertakings operating in the same product or service market but in different geographic markets, as well as between undertakings with potential horizontal links, different transactions will be prohibited precisely based on the risk of reduction or elimination of potential competition[12].

A second fear was linked to the possibility that the structural changes resulting from the transaction would encourage the new entity to engage in anti-competitive behaviour. In this case, the fundamental concern was that these operations could be used as an instrument to facilitate certain exclusionary practices, such as predatory pricing policies[13], tying or reciprocal dealing[14].

Perhaps the most significant demonstration of the mistrust aroused by these operations and the strong response of the competition authorities lies in the development of the «*entrechment*» theory. According to this theory, conglomerate mergers constituted a threat to competition if they made it possible to strengthen the dominant position already held by one of the undertakings involved in the operation. Such strengthening could be due either to the achievement of particular efficiencies (e.g. in the production or distribution of complementary products), to the increase of financial capacity or to the extension of the production line, all of which affected the position of smaller rival firms, unable to replicate these advantages[15].

11. 1968 *Merger Guidelines*, available at: https://www.justice.gov/archives/atr/1968-merger-guidelines.

12. This concern is present in the cases *U.S. v. El Paso Natural Gas Co. El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *FTC v. Procter & Gamble*, 386 U.S. 568 (1967); *U.S. v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973); *U.S. v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974); *Tenneco, Inc. v. FTC*, 689 F.2d 346 (2d Cir. 1982).

13. Certain conglomerate mergers were condemned on the theory that they could facilitate predatory conduct by creating entities with more significant financial capacity (*deep pockets*) that could afford long periods of sustained losses. See, *ad. ex.*, *U.S. v. Alum. Co. (Cupples)*, 233 F.Supp. 718, (E.D. Mo. 1964), affirmed mem., 382 U.S. 12 (1965).

14. Thus, for example, in *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965), it was held that the transaction would have enabled the merged firm to assert itself as both supplier and buyer in an intermediate market and to use the power it had on one side (as a supplier) to strengthen its position on the other (as a buyer).

15. Vid. LIM, Y: «Tech Wars: Return of the Conglomerate -Throwback or Dawn of a New Series for Competition in the Digital Era?-, *Journal of Korean Law*, 19, 2020, pp. 51 et seq.

But this situation began to change from the 1980s onwards. On the one hand, a gradual process of «de-conglomerisation» of US corporate structures will begin as other, more efficient forms of business organisation were sought[16].

Secondly, the triumph of Chicago's ideas[17] and the progressive reorientation of US competition law towards a more permissive attitude, limiting the content of the competitive offence to conduct likely to affect consumer welfare, through price rises or reductions in production, will determine the gradual abandonment of these theories and of the concern for subjecting conglomerate mergers to control. It defends the efficiency generally associated with this type of operation, the purely speculative nature of many of the arguments traditionally used to condemn them and the suitability and sufficiency of the *ex post* control regulations on business conduct (sections 1 and 2 of the *Sherman Act* and section 3 of the *Clayton Act*) if any of the practices feared, such as predatory pricing or tying, actually take place.

Administrative agencies and judicial authorities take up this new orientation. For example, the 1984 Non-Horizontal Merger Guidelines[18], remove any express reference to conglomerate mergers. They limit themselves to a general definition of non-horizontal mergers as those between companies operating in different markets and, in contrast to the previous Guidelines, recognise the generally pro-competitive nature of these operations and the presence of efficiencies linked to their relationship. Not only does the term conglomerate disappear from these DOJ guidelines on the application of section 7 of the Clayton Act, but so does any reference to the theories of harm previously used concerning conglomerate transactions, except for the possible elimination of a potential competitor. A situation which, as we have indicated above, responds to a conception, now superseded, which limited the qualification of horizontal operations to those carried out between current competitors.

This paradigm shift reaches the courts, which, with the only exception noted above, will reject the anti-competitive character of conglomerate operations. Thus, the judicial condemnation of mergers that create incentives for exclusionary conduct will become a residue of the past[19].

16. Vid. *in extenso*, on this process of deconglomeration, DAVIS, G. F./DIEKMANN, K. A./TINSLEY, C. H.: «The Decline and Fall of the Conglomerate Firm in the 1980s: The Deinstitutionalization of an Organizational Form», *cit*, pp. 549 ff.

17. The traditional policy on conglomerate mergers was severely criticised and attacked by members of the Chicago School, see especially BORK, R.: *The Antitrust Paradox: A Policy at War with itself*, New York, 1993, pp. 252 ff; POSNER, R.: «Conglomerate Mergers and Antitrust Policy: An Introduction», 44 *St. John's Law School*, 1969, pp. 529 ff.

18. *Non-Horizontal Merger Guidelines*, available at https://www.justice.gov/d9/pages/attachments/2019/07/30/2614_1_0.pdf.

19. Vid. in general, on the evolution of the treatment of conglomerate mergers in the US, OECD Competition Policy Roundtables *Portfolio Effects in Conglomerate Mergers*, DAFE/COMP (2002) 5, Contribution of the US Department of Justice (DOJ), pp. 213 et seq.; FOX, E.: «U.S. and European Merger Policy- fault lines and bridges mergers that create incentives for exclusionary practices», 10, *Geo. Mason. L. Rev.*, 2002, pp. 477 et seq.; GELLHORN, E./KOVACIC, W.: *Antitrust Law and Economics in*

B. European policy on conglomerate mergers: an ever-present guest

The US disregard for conglomerate mergers is not shared at the European level, or at least not concerning all possible forms of conglomerate concentrations. Although concerns about the anti-competitive effects of conglomerate mergers have, in some periods, been mitigated by a redefinition of these effects, conglomerate mergers have always had a place in European merger control policy.

Since the adoption in the late 1980s of the first Merger Control Regulation[20], the European Commission has consistently expressed its concern that, in some instances, these operations could lead to competition harm through the formation or strengthening of dominant positions in the common market[21].

Fundamentally, in the 1990s and early years of the 21st century, various theories were developed on the possible anti-competitive impact of these mergers, which can be included in the ambiguous and diffuse category of «*portfolio effects*» or «*range effects*». Despite the lack of a unanimous position on the scope of this concept[22], the essential concern underlying this theory is that the formation of a broad portfolio of products may encourage the merged entity to engage in certain exclusionary conduct that may end up, in the medium or long term, affecting the structure of the different markets involved and consolidating positions of power in them.

This risk will be conditional on the concurrence of at least two circumstances in the proposed concentration. First, the pre-existence of economic power —not necessarily dominant— in at least one of the affected markets and the combination of products traded in neighbouring or related markets. The relationship between the markets refers to a demand-side link due to the presence of a

a Nutshell, St.Paul, Minn. 1994, pp. 389 ff.; HOVENKAMP, H.: *Antitrust*, St.Paul, Minn. 1999, pp. 233 ff; KOLASKY, W. J.: «Conglomerate Mergers and Range Effects: It's a long way from Chicago to Brussels», 10, George Mason Law Review, 2002, pp. 533 ff; SCHERER, F. M./ROSS, D. R.: *Industrial Market Structure and Economic Performance*, Boston, 1990, pp. 188 ff; SULLIVAN, T./HARRISON, J.: *Understanding Antitrust and Its Economic Implications*, New York, 2000, pp. 371 ff.

20. Council Regulation (EEC) 4064/89 of 21 December 1989 on the *control of concentrations between undertakings*. DOUE-L-1989-81594.

21. OECD Competition Policy Roundtables *Portfolio Effects in Conglomerate Mergers*, DAFE/COMP (2002) 5, Contribution of the European Commission, pp. 239 et seq.; DRAUZ, G.: «Unbundling GE/HONEYWELL: The Assessment of conglomerate mergers under EC Competition Law», *International Antitrust Law& Policy, Ford.Corp. L. Inst.*, 2001, pp. 183 et seq.

22. Thus, for example, NALEBUFF uses a broad concept of portfolio effects, which includes both cases where there is a complementary relationship between the products, as well as cases where there is a substitution link or no link between the goods at all, DTI Economics Paper nº1, *Bundling, Tying and Portfolio Effects*, 20003, p.10. In the OECD framework, a narrower concept is used, which is limited to the effects that may arise from concentrations that combine branded products sold in neighbouring or related markets, provided that, in addition, at least one of the parties to the operation has power in one of the affected markets. OECD Competition Policy Roundtables *Portfolio Effects in Conglomerate Mergers*, DAFE/COMP (2002), Background Note, p. 23.

joint customer base (intermediate or final consumers) for the different products. This joint customer base will be mainly, but not exclusively, present in the case of complementary goods. The competitive risk of the operation may be increased in cases where the resources and financial strength of the new entity would be significantly broadened as a result of the operation.

Such mergers expand the product range of the merged entity, enabling it to offer combined packages of products, the joint purchase of which may be more attractive to business customers than the individual or separate acquisition of each of them from competing third parties. The attractiveness of the offer may be due to the existence of a technical complementarity relationship between the products (i.e. where one product cannot function without the other, such as, for example, a computer operating system and a software program), an economic complementarity relationship (products that are consumed together, such as milk and coffee, or produced together, such as petrol and diesel fuel), finally, complementarity may be of a commercial nature (where the products are part of a range that wholesale or retail distributors consider necessary to work together, such as, for example, alcoholic or carbonated beverages).

In certain circumstances, the combination of these products may give the merged entity the ability and economic incentive to engage in business practices that ultimately affect the structural shape of markets. More specifically, the firm may engage in conduct, such as tying, that allows it to extend its pre-existing economic power to one or more markets now comprised in its new product portfolio (*leverage*). The Commission has identified different types of tying, through which such extension of power can be made effective and whose realisation may be facilitated following the merger[23].

First, the merger may make it easier for the new entrant to exert pressure on its customers by refusing to supply a particular product unless other goods or even all products in the range are purchased in turn[24].

Tying can also be articulated through price incentives. The formation of a broad portfolio of complementary products gives the company flexibility in setting its offers and granting discounts so that it can use its financial capacity to offer packages of products at a lower price than the sum of the price of the individual components (*mixed-bundling*), i.e. to grant rebates conditional on the purchase of a package of products[25].

23. OECD Competition Policy Roundtables *Portfolio Effects in Conglomerate Mergers*, DAFE/COMP (2002), Contribution of the Commission, pp. 240 et seq.; DRAUZ, G.: «Unbundling GE/HONEYWELL: The Assestment of conglomerate mergers under EC Competition Law», *cit.*

24. This concern is present, for example, in the cases *Coca-Cola/Amalgamated Beverages GB* (Commission Decision of 22 January 1997, Case IV/M.794) and *Guinness/Grand Metropolitan* (Commission Decision of 15 October 1997, Case IV/M.938).

25. The possibility for the concentrated firm to engage in *mixed bundling* is at the heart of the prohibition in the *GE/Honeywell* case, discussed below (*infra)* and is present in the *Pernord Ricard/Diageo/Seagram Spirits* case (Case IV/M.2268, 2001).

A final tying scenario identified is the technical linkage between products, i.e. where products are only available as parts of an integrated system that is incompatible with individual components of competing third-party companies.

The main problem with the assessment of these practices is that at first sight —or in the short term— many of them, such as, for example, tying articulated through discounts or price concessions, may appear desirable from the point of view of final customers and consumers. However, the Commission has maintained that they may end up harming consumers by allowing the consolidation or creation of dominant positions in the medium or long term due to the marginalisation and foreclosure of competitors from the market.

Therefore, unlike horizontal or vertical mergers, the main concern traditionally associated with conglomerate mergers was not so much the immediate and direct modification of the structure of markets but the indirect strengthening or reinforcement of dominant positions through the facilitation of certain exclusionary conduct.

However, in addition to these possible anti-competitive effects or dangers, the enlargement of the product portfolio may also have beneficial effects due to the achievement of economies of scale and scope in the production and, mainly, in the joint distribution of the different goods making up the portfolio. The main problem that the assessment of these operations raised —and still raises— is that many of the potential exclusionary conducts are, at least in the short term, desirable or beneficial from the point of view of final customers and consumers (e.g. discounts or *mixed-bundling* practices).

Therefore, the assessment of these transactions is complex and raises the delicate problem of determining a valid criterion for distinguishing between potentially anti-competitive and pro-competitive transactions.

The Commission has limited itself to identifying several factors that need to be weighed in order to determine the impact that these operations may have on the competitive structure of the market (ownership of the essential brand or one or more significant brands in a given market; market shares of the various brands or products, particularly compared to the shares of competitors; the nature of the relationship between the various products in the portfolio; the relative importance of the various markets in which the parties have significant shares and brands). In general, the European Commission's policy towards these operations has been marked by scepticism and mistrust, particularly in conglomerate mergers that are likely to encourage tying practices. Considerations of this nature were present in several operations authorised after accepting a series of commitments[26] and were one of the determining factors in the prohibition of the operation in several cases, especially in the early 2000s in the controversial *Tetra Laval/Sidel*[27] *and GE/Honeywell*[28]. In both cases, the EC executive prohib-

26. See *Coca-Cola/Amalgamated Beverages GB* and *Guinness/Grand Metropolitan* cases, *cit,*

27. Commission Decision of 30 October 2001, Case IV/M.2416, *Tetra Laval/Sidel.*

28. Commission Decision of 3 July 2001, Case IV/M.2220, *General Electric/Honeywell.*

ited the planned merger on the grounds that it could lead to the creation and strengthening of dominant positions, among other reasons, by facilitating anti-competitive tying and mixed bundling practices.

This Commission policy towards conglomerate mergers was the subject of much doctrinal criticism and was severely corrected by the European Courts of Justice.

The decision in the Tetra Laval case was subsequently annulled by the Court of First Instance[29] and subsequently confirmed by the then Court of Justice of the European Communities[30]. The Commission had considered that the proposed concentration between the French subsidiary of the Dutch company Tetra Laval and the French company Sidel could lead to a strengthening of Tetra's dominant position in the market for the packaging of food in aseptic cartons and to the creation of a new dominant position by the resulting entity in two neighbouring markets: the market for packaging machinery for PET (*polyethylene terephthalate*), a material used for the production of transparent plastic bottles and, in particular, within this market, SBM (*stretch blow moulding*) machinery in which Sidel held a leading position worldwide and a second market, comprising packaging machinery for opaque HDPE (*high density polyethylene)* bottles. In the Commission's view, the latter situation arise because the new entity would have the possibility and incentive to extend its dominant position in the carton packaging market to these two other markets through tying or bundling behaviour.

The Court examines and rejects the Commission's conclusions on the anti-competitiveness of the conduct and concludes that it has failed to prove that the transaction, if authorised, would lead to a strengthening or creation of a dominant position in any relevant market. Following the same line used in other cases, such as *Airtours*[31] and *Schneider*[32], the Court carries out an exhaustive and meticulous analysis of the factual assumptions of the case. The judicial review does not question the fundamental legal principles applied by the Commission, but rather the weighing of the factual circumstances and the economic analysis of the anti-competitive effects of the transaction. The Court describes the latter as speculative, considering that the conclusions were not supported by solid elements and had not been rigorously and convincingly proven[33].

29. Judgment of the CFI of 25 October 2002, Case T-5/02, *Tetra Laval v. European Commission.*
30. Judgment of the ECJ of 15 February 20005, Case C.12/03P.
31. Judgment of the CFI of 6 June 2002, Case T-342/1999, *Airtours v. European Commission.*
32. Judgment of the CFI of 22 October 2002, Case T-310/01, *Schneider Electric v. European Commission.*
33. The CFI's judgment was appealed by the Commission before the ECJ. Among other issues, the Commission argued that the CFI had gone beyond the scope of its analysis of the decision, unduly limiting its discretion in weighing complex factual and economic circumstances. The Court, in the Commission's view, had not confined itself to a review but had assumed decision-making functions, completely substituting its own judgement and opinions for those of the Commission. This argument is rejected by the ECJ (Judgment of the ECJ of 15 February 2005, Case C-12/03 P). See a comment in VÖLCKER, S./CHARRO, P: «*Tetra Laval* -a landmark judgement on EC merger control», *Competition Law Insight,* 8 March 2005, pp. 3 et seq. and the Commission's different assessment in DRAUZ, G.: «Conglomerate and vertical mergers in the light of the Tetra Judgement», 2, *CPNL,* 2005, pp. 35 et seq.

Thus, the Court recognises that conglomerate mergers may, under certain circumstances, have anti-competitive effects. In particular, it distinguishes between two different possibilities. Firstly, conglomerate operations could result in an immediate change in the conditions of competition in a second market, as a consequence of the existence of a dominant position in a first market[34]. Secondly, mergers may lead to the strengthening or creation of a dominant position only after a time lag and as a result of a specific conduct of the merged firm in a first market. The possibility of *leverage* and its legitimacy as a criterion for the prohibition of a merger is, therefore, generally accepted[35]. However, despite this formal recognition, both the CFI and the ECJ will considerably strengthen the Commission's burden of proof in these cases, clearly and expressly establishing that the effects of these mergers are generally neutral or beneficial, so that theories of possible anti-competitive effects must be supported by objective factual circumstances and convincing evidence[36]. The Commission's analysis must demonstrate that the transaction will «in all likelihood» lead to the creation or strengthening of a dominant position «in the relatively near future», requiring a «particularly rigorous examination of the factual circumstances». Conclusions about effects that will occur only after a significant period (such as the eventual marginalisation of third undertakings from the market following the implementation of the exclusionary conduct) must, while allowing for a certain margin of discretion, be particularly plausible[37].

In the case at hand, the CFI found that the Commission had failed to meet the required standard of proof. It had failed to demonstrate that the merger would lead to the creation of a new dominant position in the market for PET equipment. While the Court acknowledged that, given the particular characteristics of the markets concerned, the merged firm would have the «possibility» to resort to conduct extending its market power, such as discriminatory practices, predatory and discriminatory pricing policies[38], what could not be proved was that it had rational «incentives» to do so[39].

The significance of the GE/Honeywell case lies in the double and contradictory prosecution of the same facts in Europe and in the US. The planned transaction was authorised, with only minor modifications, by the US authorities and prohibited by the European Commission. This decision was appealed and, al-

34. The CFI does not provide any examples of such operations.
35. «If the affected markets are neighbouring and one of the undertakings party to the concentration already holds a dominant position in one of them, the operation, through the pooling of capacities or instruments, may indeed create conditions conducive to conduct that will allow the extension, in the relatively near future, of economic power between markets» (CFI Judgment, para. 151).
36. Judgment of the CFI, para. 155.
37. Judgment of the CFI, para. 162.
38. Judgment of the CFI, paras. 192 et seq.
39. Judgment of the CFI, paras. 200 et seq.

though the CFI[40] did not overturn it, the prohibition of the merger was upheld solely and exclusively based on its possible horizontal effects, rejecting the Commission's analysis of the eventual conglomerate effects of the operation.

In principle, the CFI recognises that conglomerate mergers may, in certain circumstances, have anti-competitive effects, especially where such operations may lead to the strengthening or creation of a dominant position after a time lag and as a result of a certain conduct of the new business entity in a first market. However, despite this formal recognition, the Court will considerably tighten the Commission's burden of proof in these cases, expressly stating that theories of possible anti-competitive effects must be supported by objective factual circumstances and convincing evidence, because the effects of such mergers are generally neutral or beneficial, so. The Commission is required to demonstrate the existence of factors to prove that the merged firm's pursuit of exclusionary practices in the near future is a rational strategy. In assessing these future incentives of the company, the CFI affirms the importance of the fact that the rules of the EC Treaty explicitly aimed at the repression of anti-competitive conduct (current Articles 101 and 102 TFEU) may apply to the exclusionary conduct that is feared to be carried out. This is known as the «wait-and-see approach».

The European courts' review of the Commission's policy on conglomerate mergers at the turn of the century marked a turning point.

First, unlike in the US case, where they are even nominally eliminated, the potential competitive harm of conglomerates is addressed in the *Commission's Non-Horizontal Merger Guidelines*[41].

The Commission, as indicated above, while starting from a broad concept of conglomerate mergers, as mergers between firms whose relationship is neither strictly horizontal nor vertical, limits their potential harm to competition only to mergers between firms active in closely related markets. As a starting point, it recognises that, in most cases, conglomerate mergers are efficient and will not present any competition problems. However, anti-competitive effects, notably foreclosure, may sometimes result from such operations[42]. Foreclosure is now linked exclusively to the possibility that the transaction makes it easier for the resulting entity to engage in tying behaviour that would allow it to extend power from one market to another[43].

However, after these judgments, the Commission only very rarely took into consideration in the analysis of notified transactions the possible damage arising

40. Judgment of the CFI of 14 December 2005, Case T-210/01, *GE v. Commission*.

41. Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2008/C265/07.

42. The Guidelines also refer to possible co-ordination effects arising from conglomerate mergers (paragraphs 119-121), but unlike vertical mergers, the Commission merely notes this possibility without going into a detailed development of this possibility.

43. Guidelines (paragraphs 93-118).

from conglomerate transactions or effects[44]. In fact, during the first decade of the century, the situation was one of mere theoretical recognition but little prominence in practice.

This situation has changed in recent years and, unlike in the US, the Commission assessed conglomerate effects and imposed specific remedies to address them in several cases[45], and as we will have occasion to examine below, especially in digital markets.

III. THE CONCENTRATIONS OF THE BIG 5 IN DIGITAL MARKETS

A. The formation of large digital conglomerates

During the last decades, as we have had the opportunity to examine, especially in the US, conglomerate mergers did not form part of antitrust policy. But in recent years, we are witnessing their reappearance. It has been a measured, subtle entry with small advances. Nevertheless, they are progressively gaining prominence on the agenda of competition authorities, international organisations and forums[46], as well as in the interests of economic and legal doctrine. In the latter sense, the authors have once again sharpened their pens, recovering old theories, or suggesting new ones, of the harm to competition that can arise from operations between companies that are neither horizontally nor vertically related.

The driving force behind the policy review of recent years has been the particular structural shaping of digital markets dominated by the large technology platforms that have been creating and consolidating their empire over the last decade.

Not only the growth of these large platforms and the progressive strengthening of their market power has invoked the old conglomerate concerns. This growth and the corresponding increase in the degree of market concentration has also occurred in other economic sectors. However, the main difference is that, in the digital sphere, this growth has been radial, from one central business to other more or less interrelated products or services, giving rise to genuine

44. Vid. ad.ex. Commission Decision of 13 May 2011, Case COMP/M.2978, *Lagardère/Natexis/VUP* and Commission Decision of 15 July 20005, Case COMP/M.3732, *Procter&Gamble/Gillette*.

45. Commission Decision of 26 January 2011, Case M.5984, *Intel/McAfee*; Commission Decision of 25 February 2016, Case M.7822, *Dentsply/Sirona*; Commission Decision of 14 March 2017, Case M. 7873, *Worldline/Equens/Paysquare*; Commission Decision of 6 December 2016, Case M.8124, *Microsoft/Linkedn;* Commission Decision of 12 May 2017, Case M.8314, *Broadcom/Brocade*; Commission Decision of 18 January 2018, Case M.8306, *Qualcomm/NXP*.

46. OECD. Roundtable on Conglomerate Effects on Mergers, *cit.*; International Competition Network (ICN). *Conglomerate Mergers Project. Report* (2019-2020).

digital ecosystems and the reappearance of the extinct conglomerates in the markets. Google, Meta, Amazon, Apple are not only large digital platforms... they are also the new conglomerates of the 21st century[47].

In this sense, Google is not just a mere provider of a digital search engine. It has grown to offer services such as scheduling and time management, cloud storage, instant messaging, video chat, mapping and navigation, browsers, smartphones, etc. and is also active in AI and health. Meta, from its core business, social networking and advertising, has been expanding into other markets such as artificial intelligence, cloud computing, augmented reality and the Internet of Things. Meanwhile, Amazon, from its initial book trade business, has been vertically and conglomerately integrated. It is no longer just the great e-commerce giant, but its activities have been extended to cloud computing, data centres, drones, electronics, streaming videos. The same growth is also seen in other digital giants, like Microsoft or Apple.

This formation is not the result of internal growth, but is mainly due to external corporate growth through mergers. As has been graphically pointed out, the major platforms «are gobbling up companies with a Pac-Man ferocity»[48]. Many transactions in digital markets follow a similar pattern: mergers whereby a large, established company acquires a newcomer or *start-up* company offering a novel product or service, paying a much higher price for it than could be deduced from its revenue volume. In these transactions, the actual value of the acquired company lies in the innovative nature of the products or services offered, the information or data it controls, and its market presence in terms of the number of users of its services.

Collectively, the five platforms included in the old acronym GAFAM (MAMAA) have made more than 800 company acquisitions in the last decade.[49].

The large conglomerates are back. However, despite some immediate, rather picturesque similarities, such as the strength of the personal figure of their managers, there are significant differences between these conglomerates and those of the 1950s[50], which should not be underestimated in the design of an antitrust policy. The digital-age conglomerate is a different animal than the classic conglomerate.

Acquiring companies in different product or service markets is a quest for diversification. In the 1950s and 1960s, the business strategy justifying such diversification, without prejudice to the possible achievement of synergies, was motivated by risk management through compartimentalisation by acquiring mature companies in different product and service lines.

47. Vid. LIM, Y.: «Tech Wars: Return of the Conglomerate...», cit;

48. KRAUSE, R: «The New Digital Conglomerates: Google, Facebook, Amazon... and Apple?, cit. p.1.

49. While the exact numbers are unknown, numbers available in the public domain suggest that by December 2021, Alphabet had acquired at least 249 companies since its foundation at the turn of the century. Microsoft, 248, Apple 125; Facebook, 93 and Amazon 91. The actual numbers are likely to be higher. WITT, A. C.: «Big Tech Acquisitions: The return of the conglomerate merger control?, Concurrences, No. 3, 2020.

50. Vid. LIM, Y: «Tech Wars: Return of the Conglomerate...», cit., pp. 55 ff; DAVIS, G. F./DIEKMANN, K. A./TINSLEY, C. H.: «The Decline and Fall of the Conglomerate Firm in the 1980s: The Deinstitutionalization of an Organizational Form», cit, pp. 549 ff.

Conglomeration observed in the digital era is still a diversification strategy but with a different purpose. In the past, the diversification's primary purpose was to allocate capital to reduce volatility and risk for the firm's stakeholders. Investors embraced this approach, at least during the conglomerate form's heydays, to ensure financial stability and increase returns overtime.

In today's digital era, conglomeration seems to be pursued more out of fear of displacement rather than business cyclicality, hedging against missing out on the next big thing coming out of disruptive technologies. The strategy behind forming large digital conglomerates is the control of innovation.

However, not all is about innovation; conglomeration also seems to be a strategy to broaden the breadth and scope of customer's engagement with the firm by inducing them to continuously interact with the firm in all daily activities through an array of products and services. That is a way of capturing data and opening opportunities to generate sales or revenue while leveraging insights from collected data.

So, unlike the classic conglomerate, new age digital ones often look for synergies with a core business. Something that looks like a pure conglomerate on the surface might be a lot more coherent underneath.

B. Conglomerate effects in the recent enforcement practice

What has been the response of the competition authorities to these large digital conglomerates and to the wave of mergers that has led to their formation? As a first point of interest, it is worth noting that of these transactions, only a minimal number have been examined by the competition authorities of the different jurisdictions[51] and to date, none of the mergers proposed by the Big 5

51. In Europe, the application of merger rules in digital markets poses several difficulties in practice, mainly regarding the possibility of triggering the control mechanism. In this regard, as has been indicated, in digital markets, there are frequent mergers whereby a large, well-established company acquires a newcomer or start-up company offering a novel product or service, paying a much higher price than could be deduced from its revenue volume. The problem that arises in these cases, at the European level, is that the current notification thresholds —which trigger the control procedure— are structured according to the turnover of the companies involved in the transaction (i.e. associated only with the level of turnover of the parties, as well as some link with the territory), so that these transactions could fall outside them, without being able to assess their possible competitive impact. Moreover, the referral mechanism for transactions without a Community dimension in Article 22 was not very effective in resolving these dysfunctions because its application required that the concentration had to be notified by national thresholds (many of them also articulated around turnover and therefore, equally inapplicable). However, this interpretation will be changed in 2021, with the publication of a new Notice aimed at increasing the use of this mechanism to facilitate the detection of potentially anti-competitive transactions.

have been directly prohibited. Most of these transactions have been cleared at the initial stages of the procedure without conditions. However, despite this favourable trend, things appear to be gradually changing, and we have started to find some prohibitions in digital markets, such as the European Commission's recent decision to block the acquisition of Etraveli by Booking[52] or the withdrawing of the Adobe/Figma[53] and Amazon/iRobot[54] mergers which can be seen as quasi-prohibitions.

It is also noticeable, especially in the European framework, that some of the concerns identified in these structural growth operations, contrary to what had been the traditional policy, are not focused on the horizontal or even vertical effects of mergers but on possible conglomerate effects.

1. Europe: conglomerate effects in digital markets

The European Commission has, to date, investigated 22 acquisitions carried out by companies under the former GAFAM acronym: 3 by Meta[55]; 5 by Google[56]; 10 by Microsoft[57]; 2 by Amazon[58] and, finally, 2 by Apple[59]. Not all of them have resulted in a formal decision, and none of these operations have been subject to a ban. However, in some of the cases investigated, the Commission has identified a number of competition concerns, and has made clearance conditional on undertakings from the companies involved.

52. Commission Decision of 25 September 2023, Case M.10615, Booking Holdings/Etraveli Group.

53. Commission Decision of 18 December 2023, Case M.11033, Adobe/Figma.

54. Commission Decision of 29 January 2024, Case M.10920, Amazon/Irobot.

55. Commission Decision of 17 May 2017, Case M.8228, Facebook/Whatsapp; Commission Decision of 27 January 2022, Case M.10262, Meta/Kustomer; Commission Decision of 3 October 2014, Case M.7217, Facebook/Whatsapp.

56. Commission Decision of 11 March 2008, Case M.4731, Google/Doubleclick; Commission Decision of 28 March 2023, Case M.10796, Google/Photomath; Commission Decision of 13 February 2012, Case M.6381, Google/Motorola Mobility; Commission Decision of 17 December 2020, Case M.9660, Google/Fitbil; Commission Decision of 23 February 2016, Case M.7813, Sanofi/Google/DMI JV.

57. Commission Decision of 4 December 2013, Case M.7047, Microsoft/Nokia: Commission Decision of 21 December 2021, Case M.10290, Microsoft/Nuance; Commission Decision of 19 October 2018, Case M.8994, Microsoft/Github; Commission Decision of 5 March 2021, Case M.10001, Microsoft/Zenimax; Commission Decision of 6 December 2016, Case M. 8124, Microsoft/Linkedn; Commission Decision of 7 October 2011, Case M.6281, Microsoft/Skype; Commission Decision of 15 May 2023, Case 10646, Microsoft/Activision Blizzard; Commission Decision of 10 February 2012, Case M.6474, GE/Microsoft/JV; Commission Decision of 18 February 2010, Case M.5727, Microsoft/Yahoo/Search Business; Commission Decision of 22 September 2016, Case M.8109, FIH Mobile/Feature Phone Business of Microsoft Mobile.

58. Commission Decision of 15 March 2022, Case M.10349, Amazon/MGM; Commission Decision of 29 January 2024, Case M.10920, Amazon/Irobot.

59. Commission Decision of 25 July 2014, Case M.7290, Apple/Beats; Commission Decision of 6 September 2018, Case M.8788, Commission Decision of 6 September 2018, Case M.8788, Apple/Shazam; Commission Decision of 1 March 2017, Case M.8352, KRR/KSL/Apple Leisure Group.

It has been pointed out by the doctrine that, despite the permissive standard concerning non-horizontal mergers, which is deduced from the *Notice on non-horizontal mergers*, it is precisely about the possible vertical and, above all, conglomerate effects of the planned operations, that the Commission has decided to carry out a more in-depth investigation. Moreover, in two of the three conditional decisions that have been issued, the Commission has addressed conglomerate theories of harm: Microsoft/Linkedn and Google/Fitbit[60].

In MS/Linkedn, the Commission was concerned that MS might leverage its strong position in the market for PC operating systems to the market for professional social networks, either by preinstalling Linkedn on Windows or by integrating Linkedn features into Outlook or other Microsoft products[61]. The merger was cleared conditioned to diverse behavioural remedies (basically not to engage in the behaviours of integration and pre-installation —a form of tying— that could lead to market foreclosure).

In Google/Fitbit, the Commission considered that Google would have both the ability and economic incentive to leverage its dominant position in the supply of licensable operating systems for smart mobile devices to the market for the supply of wrist-worn wearable health devices.

The reasoning is the same in both cases: the merging parties would have the ability to engage in foreclosing conducts post-merger. To avoid this situation, approval of the transaction is made conditional on specific behavioural remedies.

2. USA: Conglomerate mergers... those who must not be named

Most of the mergers carried out by large digital operators, as in Europe, have not been subject to scrutiny by competition authorities. In fact, to date, only one case, the acquisition of ITA by Google, has reached the courts and has been the subject of compromise with the adoption of remedies of dubious effectiveness[62].

For their part, the cases examined by the US antitrust authorities have often been closed without a reasoned decision from a substantive perspective on the possible dangers to competition of the planned concentrations and the circumstances that have led to ruling out their implementation in the specific case[63].

60. Over the past few years, the Commission has examined conglomerate mergers in digital markets in Microsoft/Skype (cit.) and Intel/McAfee (cit.). The first one was conditionally cleared in phase I and the second unconditionally approved.

61. For a detailed case analysis, see: Giannino, M.: «Microsoft/LinkedIn: What the European Commission said on the competition review of digital market mergers», available at SSRN 3005299, 2017. 4, 2017.

62. US v. Google Inc and ITA software, Civil Case No. 1:11-cv-00688.

63. This was the case, for example, of the controversial acquisition of Instagram by Facebook, whose investigation was closed without explanation by the FTC. It is only now that the FTC is repentant and is seeking a retroactive review of the transaction through the application of Section 2 of the Sherman Act.

This makes it challenging t to know which theories of harm have been considered and whether they, therefore, focus on the conglomerate, horizontal or vertical effects of the transaction.

For example, investigations were initiated in four mergers with Google. The aforementioned acquisition of ITA, and the acquisitions of DoubleClick (2007); AdMob 82010) and Motorola Mobility (2012). These cases initially focused on the transactions' possible horizontal and vertical implications. However, in Google/DoubleClick, the FTC mentions the possibility that the entity resulting from the transaction could extend (leverage) its dominant position into a new market, neither horizontally nor vertically related, through bundling practices. A typical effect of conglomerate operations, therefore. The competition authorities, however, never use this term, which has disappeared from the antitrust lexicon since the publication of the 1984 Non-Horizontal Guidelines, which, it should be recalled, were limited to pointing out the risks for competition of vertical integration operations.

The new 2020 Guidelines, adopted during the Trump administration jointly by the FTC and the DOJ, do not reinstate this terminology. Indeed, the term Non-Horizontal Merger Guidelines is replaced by Vertical Merger Guidelines, excluding, in principle, even further the possible consideration of conglomerate mergers.

However, although conglomerate terminology has been effectively eliminated from antitrust policy, some authors do see its «spiritual» incorporation in the new guidelines. Some authors see its «spiritual» incorporation in the new guidelines, given the breadth with which vertical mergers are defined, encompassing strictly vertical transactions, diagonal transactions and transactions involving complementary products or services. The latter two relate to situations which, in the past, would have been classified as conglomerate mergers. Moreover, the possibility that some of the risks traditionally associated with conglomerates may again be considered in US merger control is increased, as reference is now expressly made, as a danger, not only to possible immediate effects on price or output levels but also to foreclosure effects.

In any case, and despite the greater openness of these guidelines compared to the ones of 1984, they fail to reflect the current sentiment about the objectives of competition law. These doubts about their scope are evidenced by the willingness of the FTC, led by Linda Khan, who is highly critical of the Chicago standard for assessing antitrust harm, to withdraw the FTC's signature from these guidelines unless they are reformed to reflect a broader conception of antitrust wrongdoing[64].

64. See WITT: «Who's afraid of corporate mergers...», cit.

IV. THE PATH AHEAD: MERE UNEASINESS OR REAL CALLS FOR REFORM?

The prominence of large digital firms has cast a spotlight on conglomerate effects. This brings back one of the classic antitrust law concerns, characteristic of other historical periods in which structuralist criteria marked the shaping of antitrust policy, and the fight against private economic power was one of its objectives.

However, so far, this call for reconsideration of possible competition harm arising from conglomerate transactions has had, as we have had the opportunity to examine, a limited impact on the practice of competition authorities and courts of law.

For the moment, the debate is moving at a more theoretical level, in the outline or approval of regulatory or softlaw proposals, in international forums, or in the most recent analyses of legal and economic doctrine. Although it is still incipient or not sufficiently mature, we can already draw a series of conclusions and, above all, points for reflection from this debate.

Firstly, the debate on the need for control or not of large companies and, conglomerates is not new, even if it is projected onto new markets. Nor are the arguments used in each position and the fears underpinning them new. Thus, in the face of conglomerates, questions are raised that transcend competition law —or at least, the competition law of recent decades— and reflect broader policy concerns, such as the importance of controlling the privacy of individuals, income inequalities, the obtaining of super-profits or the possible capture of the regulator. Corporate gigantism and market concentration once again generate mistrust not only from an economic perspective but also from a political one, increased in this case by the fear unleashed by the combination of this power with the ever-increasing control of personal data or information.

Focusing on competition law, I consider it important to highlight two circumstances or factors that should be considered in shaping antitrust policy regarding conglomerate mergers, particularly, mergers in digital markets.

Presently, the conception of the competitive illicit, which is focused only on the immediate outcomes of behaviour in price or output levels in defined markets and disconnected from its possible effects on the structure of those markets, is under revision. The return of structural criteria is more striking in the US, where the standard of output restriction was well established. In Europe it is less groundbreaking because, with ups and downs, a broader view of competition harm has been maintained in a dynamic approach, more focused on protecting the competitive process than on achieving a certain outcome.

By this new structural paradigm, there is again room in competition law for the consideration of conglomerate effects in the control of mergers between companies, given that the harm of which these operations are usually accused is their potential for foreclosure by facilitating exclusionary practices, such as tying or bundling practices.

There does seem to be a consensus in the economic literature that, irrespective of the valuation standard adopted, the efficiencies associated with conglomerate mergers can be substantial, and the damages are highly dependent on the specific characteristics of the affected markets.

This situation, in principle conducive or favourable to these operations, should be taken as a starting point in the analysis of conglomerate mergers in digital markets, but also taking into consideration that, given the particular characteristics of these markets, these restructuring operations may be more dangerous, and tip the balance between anti-competitive and pro-competitive effects. Greater alertness or caution is thus recommended when concluding on the pro-competitiveness of an operation and the need to weigh its effects according to the degree of market concentration or the presence of network effects that may increase its harmfulness.

The particular characteristics of digital markets facilitate the realisation of classical foreclosure theories. Economies of scale and scope and network effects can be a factor leading to market concentration, which also carries an implicit structural risk since they raise the *winner-takes-it-all* problem, which usually occurs when the value of the network is very high, the costs of multi-connection are very high, and demand differentiation between users is lower. The advantages of incumbent operators, such as the eventual *«feedback loop» of* machine learning algorithms and the limitations of multi-connection and switching service providers (loss of history, learning costs), can also facilitate the entrenchment of leading firms and the exclusion of competitors or the erection of barriers to entry.

Secondly, alongside this increased danger, these markets present new risks. There have also been attempts to offer new theories of the potential harm to competition from digital conglomerates. In reality, in many cases, these are nuances or versions of classic theories of conglomerate effects, especially those linked to the risk of foreclosure through bundling or tying. This should be the case regarding theories such as the envelopment one, which refers to the ability of a platform with dominance in one market to enter another platform market by bundling or tying the two platform products, unabling the competing platforms in the second market to compete.

Many of the new theories of harm can be linked to the aforementioned configuration of digital conglomerates as real ecosystems[65] and the motivations that determine their formation, which make it advisable to review the classic parameters and instruments for assessing the anti-competitiveness of operations.

65. This concern seems to be addressed by the fear (identified in the OECD document) that through these operations there will be an organisation of products into ecosystems that will lead to creating a «one stop shopping» experience for consumers. The fear is that barriers to entry will be created that require firms to enter several markets simultaneously or lead to coordination of behaviour and relaxation of price competition by increasing symmetry and multi-market contacts between firms.

In this sense, for example, when the European Commission has analysed the effects of various conglomerate operations (such as Microsoft/Linkedn or Google/Fitbit), it has always taken as its starting point the impact of the conduct on differentiated and isolated markets. The problem with this assessment of the impact of the transaction on competition in different product or service markets is that generally, as they are not overlapping markets, no anti-competitive effects are discernible. It has been repeatedly pointed out by the doctrine that a proper assessment of the actual effects of the transactions may require the consideration of other options in the delimitation of the relevant market, such as the presence of a single market or dependent or multiple markets.

The multi-contact nature of competition among tech conglomerates is another reason to avoid being confined to the conventional approach of compartmentalized analysis of individual product or service markets. If the focus is on access, similarities or differences between the relevant products or services may be less important, as products formerly viewed as distant from each other may be competing against one another.

As we have seen, the Commission has been receptive to these theories, incorporating them in the recent Notice on the relevant market. We will see what their significance is in practice.

Finally, it is clear from the open debate and the different doctrinal proposals that it is important to bear in mind, when assessing the anti-competitiveness of a merger in digital markets, the possible damage to innovation rather than its impact on prices or production. It should be remembered that one of the main motivations for acquiring companies operating in neighbouring, related or related markets is not to miss out on «the last new thing»

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Chapter IV

STARTUPS AND KILLER ACQUISITIONS IN TECHNOLOGY AND DIGITAL MARKETS

Ass. Prof. Dr. Carlos Gómez Asensio
University of Valencia

ABSTRACT: This chapter carries out a study of startup acquisitions in technology and digital markets, analysing their lawfulness under antitrust law, especially with regard to merger control in relation to the nascent potential competitor theory of harm. In particular, the chapter deepens into the antitrust analysis of organizational agreements whose content may imply contractual control over startups.

Keywords: Digital markets; nascent acquisitions; killer acquisitions; potential competitor; startup acquisition.

I. ACQUISITIONS IN TECHNOLOGICAL AND DIGITAL MARKETS

In recent years, the large companies operating the technological and digital markets —which include a plurality of subjects that provide various types of