# IT for Change's Submission to the EU Merger Guidelines

IT for Change

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## 7 Digitalisation

### 7.1 In your/your client's view, do the current Guidelines adequately reflect the evolutions linked to the digitalisation of the economy?

Yes, fully

Yes, to some extent

No, to an insufficient extent

Not at all

I do not know

### 7.1.1 Please explain and mention in particular which provisions of the Guidelines (if any) are not clear or outdated, or what you consider is missing from the Guidelines.

Over the last two decades, the largest technology corporations ("Big Tech") have cemented their market power using mergers and acquisitions. Competition law and its existing enforcement mechanisms have not proved effective in curtailing anti-competitive mergers—the EU approves almost all digital mergers

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unconditionally, with only a handful triggering merger reviews. This can be attributed to the following key shortcomings in the existing guidelines for merger reviews:

- **Narrow definition of markets:** The Guidelines' scope of evaluation is restricted to the impact of mergers in the "common market." [Articles 2(3) and (3), HMG] This definition presumes that the effects of a merger or acquisition are restricted to an isolated or single common market that is shared by the merging entities. The digital economy, however, consists of enterprises with a network of interconnected and interdependent actors, resembling an "ecosystem", rather than an isolated market. Enterprises build product/service ecosystems, rather than providing a single product/service. The impact of a merger, therefore, is likely to affect the ecosystem as a whole, which may also cut across adjacent markets.

- **Limitations in conceptualizing harm:** The Guidelines currently focus on "price" as the primary determinant of harms to competition and consumer welfare (Para 8 of HMG). However, Big Tech firms, operating in a data-heavy and asset-light manner, often escape merger scrutiny through zero-price models, where services are offered for 'free' in exchange for data. Under the guise of 'consumer welfare', i.e., offering services for 'free', user data is collected, enclosed, and commodified to entrench market dominance. This practice also enables easy expansion into existing and adjacent markets.

- **Overreliance on HHI measure of market concentration:** Tools like the HHI (Herfindahl-Hirschman Index) metric, developed for assessing post-acquisition horizontal mergers (Chapter III, HG), do not measure data value and user base, which are the critical resources at issue in digital mergers. For instance, aggregation of financial data and user data acquired through mergers would provide an incumbent firm with a competitive advantage to provide targeted products and services, as well as expand into adjacent markets (credit, lending, etc.). In these instances, HHI will miscalculate market share because it relies purely on dollar-value measurements to determine market concentration and does not consider the role of data and the number of users.

Against this backdrop, the Guidelines are ill-equipped to effectively analyze and evaluate data-centric dynamics. Data, as a critical resource, must be factored into merger assessments. The ability to combine datasets to create newer insights, increase switching costs for users, and the network effects that help firms entrench their dominant positions must be assessed. These dynamics often enable powerful firms to eliminate new competition through mergers and acquisitions.

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## 7.2 From your/your client's perspective, what are the new competitive dynamics that are linked to the digitalisation of the economy that should be reflected in the merger guidelines?

Digital ecosystems comprise 4 key layers—data, cloud computing, intelligence, and consumer-facing intelligent services—within which firms seek to establish control. They thus transcend market boundaries and bring new competitive dynamics, outlined below:

- **Porous market boundaries & stifling of competition:** Incumbents look to use their dominant position in one market and leverage it to gain a similar position in another, creating self-reinforcing loops that stifle competition. E.g.: Nvidia's merger with Run:ai further entrenches its control over advanced chips, a critical resource in AI markets. This paves the way for Nvidia to foreclose access to the chips or even tie/bundle Run:ai's services with its products

- **Network effects & increased switching costs:** Network effects (users beget more users, and every additional user increases value) have been a critical tool to entrench dominance. The resultant network ties, in addition to the tendency

of large firms to create stacks of interdependent technologies (eg, the Apple ecosystem is not interoperable with competitors), generate powerful lock-in effects. This deters consumers from switching to a competitor, while also reducing incentives to innovate. The collective inertia thus ensures a steady revenue stream for the largest firms, while distorting competition in the relevant ecosystems

- **Amplification of intelligence value through data:** At a technical level, data is a non-rivalrous resource that has infinite (re)use by all players in a market. However, data's criticality lies in its ability to cumulatively amplify intelligence value; far more valuable than singular data points. Big Tech has acquired its competitive advantage by extracting, hoarding, and enclosing data as well as establishing control over the infrastructures necessary to create intelligence from data (cloud and compute capabilities, proprietary algorithms). Data is thus a rivalrous asset in digital marketplaces, which newer entrants and competitors are prevented from accessing

- **Killer acquisitions that restrict innovation:** Big Tech often pushes new entrants towards peripheral markets or designated "kill zones." Here, they are restricted from offering their products/services independent of Big Tech, or they are discontinued, i.e., "killed". Nearly 67% of the companies Big Tech acquired between 2019-25 were discontinued

These dynamics also exacerbate international inequality between Global North and South firms, with the latter becoming mere providers of the raw material of data, users, and labor. This forecloses meaningful digital innovation and competition in South markets that are left to the control of Big Tech. E.g., Meta's AI model capable of translating over 50 African languages was outperformed by models built by local organizations (Ghana NLP, Lesan), but they received little to no investment, as investors assumed Meta rendered these obsolete. Thus, products that serve communities in the South are sidelined in favour of Big Tech.

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## 7.3 How can mergers between companies active in different markets shaped by digitalisation harm competition? Please explain whether due to the specific competitive dynamics in those markets, non-horizontal mergers might harm competition in non-traditional ways, that is not necessarily because the merged entity will adopt a foreclosure conduct but because of e.g. increased barriers to entry or elimination of potential competition linked to digital ecosystems, data accumulation, interoperability degradation, targeted foreclosure. Please explain why and how this could harm competition and which evidence and metrics the Commission can rely on.

An important aspect of how firms in digital markets exert control is by gathering real-time intelligence over activities and actors in a given market. The granularity of this data-derived intelligence allows for frictionless expansion into adjacent markets. Mergers in different markets, also known as non-horizontal mergers, have long been considered less problematic than their horizontal counterparts. However, incumbents in the digital economy leverage access to key resources, in particular data, to expand their dominance into and shape adjacent markets. There are thus novel harms to competition that challenge traditional perspectives on non-horizontal mergers.

- **Creation of strategic dependencies & barriers:** The emerging dynamics of the AI economy encapsulate the hidden dependencies in digital markets, with Big Tech players leveraging their market power and control over foundational infrastructure to ensure that newer entrants remain dependent on Big Tech. Amazon, Google, and Microsoft dominate the global cloud market, making them an important gateway to consumers that new players are dependent on. Nvidia retains near-total control over the chips required for advanced computing capabilities, once again creating dangerous dependencies for critical resources and raising entry barriers in the AI market.

- **Dilution of privacy, safety & consumer welfare standards:** Competition guidelines often mislabel privacy as a concern for data protection alone. However, mergers in non-horizontal yet data-rich markets raise significant concerns for privacy and, by extension, digital safety and consumer welfare. For eg, when a social media giant merges with a digital payments app, it can build targeted services based on the aggregate data (eg, on spending and browsing patterns). Thus, Big Tech has stifled competition that may otherwise have offered better privacy protections with respect to sensitive financial data.

- **Interoperability & access degradation:** Big Tech firms strategically leverage interoperability to distort competition. They deliberately 'degrade' interoperability to restrict rivals' access to necessary inputs or technical improvements, and also make their products/services interoperable with the merging entity alone. The Google/Fitbit merger demonstrates how Google would tie Fitbit's wearable device to the Android operating system, creating a critical dependency on Google's OS. However, caution should be exercised when evaluating mandatory interoperability as a remedy against these practices, as horizontal interoperability (the ability of digital services to communicate with rival services) can entrench market dominance – consumers naturally gravitate towards larger players and the full richness of features they offer. In contrast, vertical interoperability (the ability of digital services to incorporate data, content, or functionality from an upstream provider) can be a useful instrument to open up vertically integrated digital ecosystems to competitors.

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## 7.4 In markets driven by technological changes, what would be an appropriate timeframe for the Commission to adequately assess the impact of mergers on competition? Should there be a distinction between markets before and after "tipping" to a leading company?

The determination of a time frame to assess the impact of mergers is a challenging task. It demands that the regulating entity have pre-requisite knowledge of the impact of a merger, which is difficult to achieve given the persisting information asymmetry. Notably, the anticompetitive effects of conglomerate mergers, such as Microsoft's Integration with Skype and Lync, came to the fore five years after the merger was cleared. The challenge to determining a strict timeline for impact assessment is that the Commission may block mergers with clear short-term efficiencies. However, disproportionate focus on short-term efficiencies may compel the Commission to disregard long-term harm. For instance, in their merger with Run:ai, Nvidia announced that Run:ai's services will remain open source, encouraging innovation in the sector. However, the French Competition Commission, among other experts, has raised concerns of 'open washing' where access is later foreclosed to

create dangerous lock-ins. The Guidelines, in lieu of enforcing rigid timelines, could adopt the following:

- **Ex Ante interventions:** While the Commission faces the risk of overregulation, which may raise barriers to entry for smaller players, the cost of underregulation remains high. Incumbents leverage their resources and strategically consolidate their dominance, often through mergers and acquisitions. In order to preserve innovation, the Commission must adopt ex ante interventions, including interim injunctions, detailed merger reviews and obligations to share data. Restoring innovation efficiencies after tipping is far more difficult to achieve.

- **Dynamic merger review process:** Borrowing from the Commission's verdicts in Microsoft/LinkedIn, 2016, and Apple/Shazam, 2018 judgments, the Commission could undertake a dynamic review process to ensure strategic intervention *before* tipping. First and foremost, the Commission must reverse the burden of proof to assess long-term effects. The relevant entities must adequately demonstrate, with submitted evidence, that the merger will not generate anti-competitive effects, while benefiting competition in the long run.

- **Evaluating history of market behavior:** The Commission could enquire about factors such as the value of services, the costs of market entry, horizontal differentiation between incumbent and entrant products and services, and benefits derived from data. The buyer's past mergers must also be brought within the scope of review to assess whether former mergers and acquisitions have killed, neglected, or wasted the potential of nascent players.

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# 9: Public policy, defence and security as well as labour market considerations

## Question 9.3 Please explain and specify in which circumstances you / your client believe(s) that a merger can result in harm in labour markets and to workers, and how this may also impact consumers.

The rise of digital labor platforms has corresponded with the dilution of workers' rights and dignity. Digital workers are often classified as "independent contractors" in lieu of employees, depriving them of traditional labor rights. Vertical integration across enterprises also allows incumbents to exercise control and supervise smaller players, resulting in the rise of extractive labor practices down the value chain. In particular, workers in the Global South are shortchanged as mergers exacerbate the control of transnational entities over labor markets in the South, where they seek to leverage the low cost of labor and weak enforcement of labor standards, with the cumulative effect of worsening labor conditions and/or violating workers' rights. For instance, ScaleAI, acquired by Meta, provides data work services at cheap rates with no benefits for workers; a condition not likely to improve with a profit-maximizing motivation. Notably, ScaleAI's RemoTasks shut down operations in Kenya, Nigeria, and Pakistan in 2024, in addition to ~14% of its workforce being let go earlier this year. Some negative consequences for workers as a result of digital mergers are below:

- **Increased precarity:** Workers in the digital economy are often deprived of protections enjoyed by standard employees that provide a buffer against the vagaries of mergers and acquisitions. While all mergers can contribute to layoffs and loss of jobs, only employees are entitled to legal protections such as severance pay, notice period, last-in-first-out protections during retrenchment, etc. On the contrary, those legally classified as independent contractors, such as gig workers, are left in the lurch without any protective buffer against merger-induced uncertainties.
- **Loss of collective bargaining rights**: The legal status of gig workers as "enterprises" under competition laws can make attempts at collective bargaining seem anti-competitive, diluting workers' organizing rights vis-a-vis Big Tech.
- **Restrictions on freedom to change jobs:** Larger enterprises mandate "non-compete" agreements to ensure workers cannot make a lateral shift in the industry, directly limiting workers' freedom to change jobs. This also restricts innovation and raises barriers to entry, as there are fewer opportunities to set up new businesses.

On a positive note, Delivery Hero and Glovo were fined €329 million by the Commission for participation in an online food delivery cartel where they agreed not to poach each other's employees and distorted competition by exchanging commercially sensitive information and allocating geographical markets.

The dilution of workers' rights through digital mergers can also negatively impact consumers, through higher prices, lower quality, and reduced competition and innovation that lock consumers into unfavourable ecosystems. Thus, the guidelines should consider workers' rights as an integral component of evaluating digital mergers, also from the point of view of consumer welfare.

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