Amazon/iRobot: harbinger of legal dissonance, or lesson in unintended consequences?

28 May 2024

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Draft of an article to be published by Edward Elgar Limited in (2024) 23 (1) Competition Law Journal

Abstract: This article examines the process that resulted in the abandonment of Amazon's proposed acquisition of iRobot in light of the Statement of Objections issued by the European Commission and the substantive provisions of the newly enacted Digital Markets Act. It questions whether the Commission could have credibly challenged the deal on the basis of concerns that Amazon may have had the ability and incentive to engage in certain potentially harmful conduct that would already, to a not insignificant extent, have been prohibited *ex ante* under the Digital Markets Act. While a more vigilant approach to merger control may be warranted in response to perceived historical underenforcement, intervention motivated by the increasingly popular sentiment that competition in digital markets is suffering a 'death by a thousand cuts' should be underpinned by a cogent theory of harm. Insights may be drawn from an emergent ecosystem theory, which seeks to refocus the lens of competition law from narrow market definition to capture a broader network of complementors. However, it is suggested that the decimation of iRobot precipitated by regulatory over-reach stands in diametric opposition to the broad objectives espoused, in particular, by a new generation of competition officials. Ultimately, this article questions whether the outcome of the Commission's investigation in *Amazon/iRobot* stands as a harbinger of legal dissonance, or a lesson in unintended consequences.

Keywords: EU Merger Regulation, Digital Markets Act, self-preferencing, data, ecosystems

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1. Introduction

The abandoned *Amazon/iRobot*[1] deal represents arguably one of the most significant cases in European Union (EU) merger control in recent years. Notably, it is the first instance in which the potentially harmful conduct identified by the European Commission (Commission) in its Statement of Objections[2] clearly mirrors conduct that is prohibited *ex ante* under the recently enacted Digital Markets Act.[3] Symptomatic of macro-level policy changes affecting international merger control, the outcome merits a rigorous analysis of the Commission's assessment. After examining the substance of the Statement of Objections in section 2, this article explains, in section 3, how legal dissonance arises, in particular, between the EU Merger Regulation[4] and the Digital Markets Act and questions the position adopted by the Commission. It proceeds, in section 4, to consider the potential role that ecosystem theory might play in advancing an understanding of anticompetitive conduct in the digital economy. Finally, in section 5, the article assesses the unintended consequences of the Commission's intervention, before concluding, in section 6, with an evaluation of the implications of the outcome in *Amazon/iRobot* for future mergers in the EU.

2. The Commission's Statement of Objections

In contrast to the array of potential concerns that the Commission might have raised in its Statement of Objections,[5] the theory of harm put forward follows the traditional vertical foreclosure playbook. Indeed, the Commission's initial investigation appeared far more ambitious and sought to assess not only whether the acquisition may '(i) restrict competition in the market for the manufacturing and supply of RVCs [robot vacuum cleaners]' but also critically '(ii) allow Amazon to strengthen its position in the market for online marketplace services to third-party sellers (and related advertising services) and/or other data-related markets'.[6] While both potential harms are addressed in the Commission's Statement of Objections, the critical second limb failed to fully materialize. That is significant because it was precisely this limb which gave rise to the greatest uncertainty and anticipation: uncertainty as to the breadth of the net cast by the notion of 'other data-related markets', and anticipation as to whether the Commission would grasp the proverbial mantle and elaborate an enlargement of its portfolio of

[1] Case M.10920 *Amazon/iRobot,* abandoned on 29 January 2024; see European Commission press release, *Statement by Executive Vice-President Vestager on announcement by Amazon and iRobot to abandon their transaction* (STATEMENT/24/521, 29 January 2024).

[2] European Commission press release, *Commission sends Amazon Statement of Objections over proposed acquisition of iRobot* (IP/23/5990, 27 November 2023).

[3] Regulation 2022/1925 on contestable and fair markets in the digital sector (Digital Markets Act) [2022] OJ L 265/1. For the author's earlier articulation of this point, see B. Evans, 'Amazon/iRobot: does the European Commission have an "echo" problem?' (2023) Society for Computers and Law, Computers and Law 50th Anniversary Issue December 2023, available at: https://www.scl.org/product/computers-law-december-2023 (accessed 5 May 2024).

[4] Regulation 139/2004 on the control of concentrations between undertakings (the EU Merger Regulation) [2004] OJ L 24/1.

[5] For a summary of potential concerns, see in particular T. Smith, 'Amazon/iRobot: The flywheel spins once more' (*The Platform Law Blog*, 8 September 2022), available at: https://theplatformlaw.blog/2022/09/08/amazon-irobot-the-flywheel-spins-once-more/ (accessed 5 May 2024).

[6] European Commission press release, *Mergers: Commission opens in-depth investigation into the proposed acquisition of iRobot by Amazon* (IP/23/3702, 6 July 2023).

theories of harm towards a so-called 'ecosystem theory harm'. In fact, it should be noted that the Statement of Objections neither directly refers to nor invokes such a theory.

At the outset, the Commission engages convincingly with the question as to whether Amazon would have the ability to foreclose rivals to iRobot. It finds that Amazon may, indeed, have had such an ability owing to the fact that its online marketplace represents a 'particularly important channel' for the sales of robot vacuum cleaners in France, Germany, Italy and Spain.[7] This notably aligns with the conclusion reached by the Competition and Markets Authority (CMA) in its review of the transaction, according to which Amazon had the ability to 'use its position as a major retailer to disadvantage rival robot vacuum cleaner manufacturers.'[8] Building upon this finding, the Commission states that consumers in those Member States 'particularly rely on Amazon both in terms of product discovery as well as for their final purchasing decision.'[9] Although it should be commended for acknowledging the significance of Amazon's power both conventionally as an online marketplace and, more broadly, as a search engine, both the conceptual leap from 'importance' to 'reliance' and the potential competitive constraint exerted by rival search engines merit deeper scrutiny. Crucially, the Commission asserted that Amazon could have engaged in foreclosure using a number of discrete strategies: first, it could delist rival robot vacuum cleaners, or, secondly, reduce their visibility in 'both non-paid (i.e., organic) and paid results (i.e., advertisements) displayed in Amazon's marketplace.'[10] Thirdly, access to product recommendation 'widgets' or 'commercially-attractive product labels' such as 'Works with Alexa' could be limited by the firm.[11] Lastly, it claimed that Amazon may have been able, directly or indirectly, to raise the cost for rivals to advertise and sell their robot vacuum cleaners on its marketplace.[12]

Given this relatively uncontroversial finding of Amazon's ability to foreclose, the seminal question concerns its incentive to do so and asks whether Amazon would find such foreclosure of rivals to iRobot economically profitable. This calculus involves predicting whether the resulting future losses incurred by Amazon in the shape of, in particular, forgone sales commission and diminished advertising revenues would be outweighed by gains from additional iRobot sales. According to the summary of the Statement of Objections, losses from fewer sales of rival and related products on Amazon's marketplace would act as an insufficient counterbalance to any potential gains.[13] Notably, the Commission makes no reference to the size and predicted growth of the robot vacuum cleaner market. However, it is advanced that such gains would 'include benefits from additional data gathered from iRobot's users.'[14] While this may be case, in order to assess whether data-related gains would give rise to a significant impediment of effective competition it is relevant to determine whether the market for robot vacuum cleaners is of strategic importance, and in particular within the context of the 'smart home' market.

[7] Commission press release, IP/23/5990 (fn 2).
[8] Case ME/7012/22 *Anticipated acquisition by Amazon.com, Inc of iRobot Corporation* (16 June 2023); see CMA press release, *Amazon's purchase of Roomba maker cleared by CMA* (16 June 2023).
[9] Commission press release, IP/23/5990 (fn 2).
[10] Commission press release, IP/23/5990 (fn 2).
[11] Commission press release, IP/23/5990 (fn 2).
[12] Commission press release, IP/23/5990 (fn 2).
[13] Commission press release, IP/23/5990 (fn 2).
[14] Commission press release, IP/23/5990 (fn 2).

The paucity of the information in the Commission's press release concerning its Statement of Objections may, of course, belie an appropriately thorough analysis. Yet, it cannot be overlooked that the CMA determined the market for robot vacuum cleaners to hold 'limited strategic importance' and found that rival 'smart home' platforms would not be put at a disadvantage on the basis that 'robot vacuum cleaners (and the data that they gather) are generally not considered to be an important input to the emerging "smart home" market.'[15] Moreover, the CMA observed that 'several alternative' robot vacuum cleaners with 'similar capabilities' exist in the market with which 'rival "smart home" offerings' could integrate.[16]

3. Legal dissonance

The theory of harm advanced by the Commission in its Statement of Objectives relies upon 'self-preferencing' and clearly mirrors the General Court's judgment in *Google and Alphabet v. Commission (Google Shopping)*.[17] Significantly, that case has led to the development of 'self-preferencing' into a stand-alone abuse under Article 102 TFEU and, while the forthcoming judgement of the Court of Justice will finally lay the matter to rest, the Commission's position has been emboldened by the recent Opinion of Advocate General Kokott.[18] This article will neither engage in a critical analysis of the merits of *Google Shopping* nor with the challenge of developing a limiting principle for the application of 'self-preferencing' in digital markets. For the present purpose, it suffices that Google was found to have given its own comparison shopping services an illegal advantage by affording them a more prominent placement than competitors in its general search results, while categorically demoting those competitors by giving them a less prominent placement.[19] This line of argument, and the position of the Commission, has been further reinforced by the *Amazon Buy Box* case,[20] in which the Commission accepted comprehensive commitments from Amazon to address alleged 'self-preferencing' in relation to its Buy Box.[21] Importantly, the newly enacted Digital Markets Act draws directly upon both cases in the formulation of Article 6(5), which prohibits designated 'gatekeepers' from treating their own services and products more favourably in ranking than similar third-party products and services and obligates them to apply 'transparent, fair and non-discriminatory conditions to such ranking'.[22]

The Statement of Objections in *Amazon/iRobot* also invites comparison to the Commission's findings in *Amazon Marketplace*.[23] In that case, the Commission investigated concerns that, alongside 'self-preferencing', Amazon had been using non-public data relating to the activities of independent sellers on its marketplace to 'calibrate' its retail offers and 'strategic business

[15] CMA press release (fn 8).
[16] CMA press release (fn 8).
[17] Case T-612/17 *Google and Alphabet v. Commission* (*Google Shopping)* EU:T:2021:763.
[18] Opinion of Advocat General Kokott, Case C-48/22 P *Google and Alphabet v. Commission (Google Shopping)* EU:C:2024:14.
[19] *Google Shopping* (fn 17).
[20] Cases AT.40702 *Amazon Marketplace* and AT.40703 *Amazon Buy Box* (20 December 2022).
[21] European Commission press release, *Antitrust: Commission accepts commitments by Amazon barring it from using marketplace seller data, and ensuring equal access to Buy Box and Prime* (IP/22/7777, 20 December 2022).
[22] Digital Markets Act (fn 3), Article 6(5).
[23] *Amazon Marketplace* and *Amazon Buy Box* (fn 20).

decisions to the detriment of the other marketplace sellers.'[24] The Digital Markets Act draws directly upon these competition law concerns in the construction of Article 6(2), which prohibits 'gatekeepers' from using non-public data generated or provided by business users and their customers in competition with those business users.[25] The Commission's investigation in *Amazon Marketplace* also concluded with the acceptance of comprehensive commitments put forward by the firm.[26] Indeed, it is apparent that Amazon is not only prepared for compliance with the Digital Markets Act, but willing to enter into commitments that go further than the new requirements demand.[27] Furthermore, Article 6(10) of the Digital Markets Act mandates 'gatekeepers' to provide business users on a free of charge basis with 'effective, high-quality, continuous and real-time access to, and use of' business and end user data that is provided for or generated through the use of its platform.[28] That *ex ante* obligation would also apply to Amazon.

Hence, the most fundamental question posed by *Amazon/iRobot* emerges: how could the Commission have credibly challenged Amazon's acquisition of iRobot on the basis of concerns that Amazon might have had the ability and incentive to engage in conduct that would already, to a not insignificant extent, have been prohibited *ex ante* under its flagship Digital Markets Act?[29]

In order to answer this question, it is necessary to examine an underexplored, and overlooked, provision in EU merger control which requires the Commission to undertake an assessment as to the unlawfulness of the foreclosure conduct at issue as part of the substantive compatibility test. Born out of the case law and enshrined in the rules of practice, specifically *Tetra Laval*[30] and *General Electric*[31] and the Commission's Non-Horizonal Merger Guidelines,[32] the assessment has generally been conceived of as an *ex ante* assessment of *ex post* unlawfulness. Paragraph 46 of the Non-Horizontal Merger Guidelines states that: 'when the adoption of a specific course of conduct by the merged entity is an essential step in foreclosure, the Commission examines both the merged entity's incentives to adopt such conduct and the factors liable to reduce, or even eliminate, those incentives, including the possibility that the conduct is unlawful.'[33] Notably, '[c]onduct may be unlawful *inter alia* because of competition rules or sector-specific

[24] European Commission press release, *Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices* (IP/20/2077, 10 November 2020).
[25] Digital Markets Act (fn 3), Article 6(2).
[26] Commission press release, IP/22/7777 (fn 21).
[27] In a speech on the commitments offered by Amazon, Margrethe Vestager, Executive Vice-President of the European Commission, stated that: '[s]pecifically, the second Buy Box and the Prime commitments address our competition concerns but would not be covered by the DMA'; see *Remarks by Executive Vice-President Vestager on the decision to make binding commitments offered by Amazon* (SPEECH 22/7850, 20 December 2022).
[28] Digital Markets Act (fn 3), Article 6(10).
[29] For the author's earlier articulation of this question, see: Evans (fn 3).
[30] Case C-12/03 P *Commission v. Tetra Laval BV* EU:C:2005:87.
[31] Case T-210/01 *General Electric v. Commission* EU:T:2005:456.
[32] European Commission Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C 265/1.
[33] Non-Horizontal Merger Guidelines (fn 31), para 46. The same analysis is referred to in paras 71 and 110.

rules at the EU or national levels.'[34] Although the Non-Horizontal Merger Guidelines emphasize that 'an exhaustive and detailed examination of the rules of the various legal orders which might be applicable and of the enforcement policy practised within them'[35] should not be demanded of the Commission, a firm grounding of merger control within the broader EU legal order is nevertheless required. The Non-Horizontal Merger Guidelines set out how, '[i]n particular, the Commission will consider, on the basis of a summary analysis' three factors:[36] first 'the likelihood that this conduct would be clearly, or highly probably, unlawful under Community law',[37] second 'the likelihood that this illegal conduct could be detected',[38] and third 'the penalties which could be imposed.'[39]

This article shall not engage with the problems associated with factoring *ex post* unlawfulness under Article 102 TFEU into *ex ante* merger control. Inherent in the language of paragraph 46 of the Non-Horizontal Merger Guidelines is a certain level of ambiguity as to the appropriate legal standard. In order to be applied as a filter to capture conduct within the traditional competition law framework, clarification of the legal standard for establishing the 'likelihood' that a given conduct would be 'clearly, or highly probably, unlawful' would be required. It would also be necessary to clarify a methodology for determining the 'likelihood' of detection and, furthermore, to clarify the threshold at which a given penalty may be considered a sufficient deterrent. Notably, it is persistently argued that both the duration of competition law cases and the level of fines arising from a finding of long-run illegality are ineffectual enough to warrant the prevailing transition to an *ex ante* regime, with the experience in *Google Shopping* frequently cited.[40] Moreover, in the case of Amazon's commitments in *Amazon Marketplace and Amazon Buy Box*,[41] it must not be forgotten that commitments represent the conclusion of proceedings in accordance with Article 9(1) of Regulation 1/2003,[42] with no finding by the Commission of an infringement of Article 102 TFEU.[43] As such, the Commission could be forgiven for downplaying

[34] Non-Horizontal Merger Guidelines (fn 31), para 46. The same analysis is referred to in paras 71 and 110.
[35] Non-Horizontal Merger Guidelines (fn 31), para 46. The same analysis is referred to in paras 71 and 110.
[36] Non-Horizontal Merger Guidelines (fn 31), para 46. The same analysis is referred to in paras 71 and 110. This three factor formulation follows the finding of the Court of First Instance in *Tetra Laval BV v. Commission*: '[w]hile it is appropriate to take account, in its assessment, of incentives to engage in anti-competitive practices … the Commission must also consider the extent to which those incentives would be reduced, or even eliminated, owing to the illegality of the conduct in question, the likelihood of its detection, action taken by the competent authorities, both at Community and national level, and the financial penalties which could ensue.' Case T-5/02 *Tetra Laval BV v. Commission* EU:T:2002:264, para 159.
[37] *General Electric v. Commission* (fn 31), paras 74–75, 311–312, as cited in Non-Horizontal Merger Guidelines (fn 32), para 46. The same analysis is referred to in paras 71 and 110.
[38] Case M.3696 *E.ON/MOL* (21 December 2005), paras 433, 443–446; Case M.3440 *EDP/ENI/GDP* (9 December 2004), para 424, as cited in Non-Horizontal Merger Guidelines (fn 32), para 46.
[39] Non-Horizontal Merger Guidelines (fn 32), para 46. The same analysis is referred to in paras 71 and 110.
[40] For a recent reiteration of this line of argument, see J. Espinoza, 'Why Big Tech fines do not work', *Financial Times* (10 April 2024), available at: https://www.ft.com/content/ba6eb664-b981-42d7-b24a-65e7e19889f8 (accessed 5 May 2024).
[41] *Amazon Marketplace* and *Amazon Buy Box* (fn 20).
[42] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1, Article 9(1).
[43] Commission press release, IP/22/7777 (fn 21). The provisions of the Commitments for monitoring and compliance are, nevertheless, noteworthy: 'Under supervision of the Commission, an independent

the extent to which the incentives for firms such as Amazon to engage in a variety of potentially harmful conduct, including 'self-preferencing', would be eliminated, or even reduced, by EU competition law.

In the case of the Digital Markets Act, however, application of this filter should be far less ambiguous and more straightforward. One of the extolled virtues of the new *ex ante* regime is legal certainty, from which both the Commission and the parties should equally benefit. Evidently, the first step in assessing an undertaking's incentives to foreclose, according to which the Commission should assess 'the likelihood that … conduct would be clearly, or highly probably, unlawful under Community law' may be regarded as fulfilled, to the extent that such conduct is captured *ex ante* by the negative and positive obligations laid down in Articles 5, 6 and 7 of the Digital Markets Act.[44] This line of interpretation may be reasoned analogously to the judgement of the Court in *General Electric*, according to which General Electric's dominant position on the market for large commercial jet aircraft engines prior to the merger meant that 'the Commission necessarily had available all the evidence required … to assess, without the need to carry out a detailed investigation in that regard, to what extent the conduct which it itself anticipated … would constitute infringements of Article 82 EC and be sanctioned as such.'[45] As to the second and third steps, considering the comprehensive provisions of Chapter V of the Digital Markets Act relating to the Commission's investigative, enforcement and monitoring powers,[46] it would not be unreasonable to suggest that 'the likelihood that … illegal conduct could be detected' is sufficiently high to factor strongly into *ex ante* merger control analysis. The Commission has already demonstrated its capacity to initiate remarkably rapid non-compliance investigations[47] and, moving forward, Article 30 of the Digital Markets Act provides that the Commission may impose fines for non-compliance, whether intentional or negligent, amounting to up to 10% of an undertaking's annual worldwide turnover and up to 20% where 'the same or a similar infringement' is committed within an eight year window,[48] complemented by periodic penalty payments of up to 5% of the average daily worldwide turnover per day.[49]

As a point of positive law and rule of practice, in assessing Amazon's incentives to foreclose, the Commission should have taken into account the substantive provisions of the Digital Markets Act as a key factor 'liable to reduce, or even eliminate' the incentives for Amazon to adopt the foreclosure conduct set out in the Statement of Objections. Amazon has been designated as a 'gatekeeper' under the Digital Markets Act and, to the extent that the conduct at issue is clearly captured by Article 6, it would have been held *per se* unlawful, vigilantly monitored and investigated and the subject of substantial penalties.[50] To be sure, the corollary of legal certainty as to the *ex ante* unlawfulness of certain conduct under the Digital Markets Act must be legal

trustee will be in charge of monitoring the implementation and compliance with the commitments,' as are the provisions for fines: 'If Amazon were to breach the commitments, the Commission could impose a fine of up to 10% of Amazon's total annual turnover, without having to find an infringement of EU antitrust rules or a periodic penalty payment of 5% per day of Amazon's daily turnover for every day of non-compliance.'

[44] Digital Markets Act (fn 3), Articles 5, 6, 7.

[45] *General Electric v. Commission* (fn 31), para 311.

[46] Digital Markets Act (fn 3), Chapter V.

[47] European Commission press release, *Commission opens non-compliance investigations against Alphabet, Apple and Meta under the Digital Markets Act* (IP/24/1689, 25 March 2024).

[48] Digital Markets Act (fn 3), Article 30.

[49] Digital Markets Act (fn 3), Article 31.

[50] Digital Markets Act (fn 3), Article 6.

certainty that mergers in which the theory of harm hinges on that conduct should, *ceteris paribus*, be cleared relatively straightforwardly by the Commission.

Based upon the press summary of the Commission's Statement of Objections, it would appear that the Commission may have failed to appropriately take into account the substantive provisions of the Digital Markets Act in its analysis in *Amazon/iRobot*. If this is, indeed, the case, then a timely corrective would be due. In *General Electric*, the Court held that the Commission had 'made an error of law in failing to take into account the deterrent effect' that an infringement of competition law 'might have had on the merged entity'.[51] Crucially, given that the deterrent effect 'could materially have influenced the Commission's appraisal of how likely it was that the conduct in question would be adopted', the Court declared the Commission's analysis to be 'necessarily vitiated by a manifest error of assessment.'[52] While, as Amazon abandoned the transaction, the Commission will not publish a final decision, it is particularly indicative of the state of its analysis that Olivier Guersent, Director-General of the Commission's Directorate-General for Competition, has described *Amazon/iRobot* as 'a relatively classical case, even if it is a bit more subtle, … of self-preferencing'.[53] Clearly, save for unknown 'subtleties', this statement serves to reinforce the centrality of the Digital Markets Act to an appropriate merger assessment. Hence, Guersent's subsequent claim that 'we think we had a very good case for this. A lot of evidence. And we actually think that this is why Amazon decided to drop the case rather than take a negative decision and challenge it in Court,' should not be interpreted as a victory but scrutinized as anomalous.[54]

4. Ecosystem theories of harm

The speculative question remains as to whether the Commission could have bolstered its position by tabling an alternative theory of harm to that raised in its Statement of Objections. While a more vigilant approach to merger control may be warranted in response to perceived historical underenforcement of mergers, intervention motivated by the increasingly popular sentiment that competition in digital markets is suffering a 'death by a thousand cuts'[55] should be underpinned by a cogent theory of harm.[56] Insights may be drawn from an emergent ecosystem theory, which seeks to refocus the lens of competition law from narrow market definition to capture a broader network of complementors.[57] This article does not undertake an analysis of the various definitions of 'ecosystems' advanced in the academic literature; rather, for the present purpose, it is instructive to follow the definition provided in the Commission's revised Market Definition Notice, according to which: '(Digital) ecosystems can, in certain circumstances, be thought of as consisting of a primary core product and several secondary (digital) products whose consumption is connected to the core product, for instance, by technological links or interoperability'.[58] Saliently, this definition draws upon the finding of the General Court in *Google Android* that 'in a digital "ecosystem", which brings together several

[51] *General Electric v. Commission* (fn 31), para 311.
[52] *General Electric v. Commission* (fn 31), para 312.
[53] See O. Guersent and A. Schwab, *Rebooting the Next Commission*, roundtable at the Antitrust, Regulation and the Next World Order Conference (Brussels) (31 January 2024), available at: https://www.youtube.com/watch?v=oPguxQouOEA (accessed 5 May 2024).
[54] Guersent and Schwab (fn 53).
[55] See e.g. Smith (fn 5).
[56] For the author's earlier articulation of this point, see Evans (fn 3).
[57] For the author's earlier articulation of this point, see Evans (fn 3).
[58] Commission Notice on the definition of the relevant market for the purposes of Union competition law C/2023/6789 (2023), para 104.

categories of supplier, customer and consumer and causes them to interact within a platform, the products or services which form part of the relevant markets that make up that ecosystem may overlap or be connected to each other on the basis of their horizontal or vertical complementarity.'[59]

In the years following *Google Android*, it has become *à la mode* to talk of emerging 'ecosystem theories of harm' in merger control, in particular following the CMA's controversial intervention in *Microsoft/Activision*.[60] Yet, it should be noted that the CMA in that case and also, notably, the Bundeskartellamt in *Meta/Kustomer*[61] suggested but ultimately failed to elaborate and follow-through on discrete 'ecosystem theories of harm'.[62] Indeed, the Commission's prohibition decision in *Booking/eTraveli*[63] represents the first instance in which an 'ecosystem theory of harm' has properly materialized. In essence, in that case the Commission found that, given the importance of flight online travel agency services as a channel for hotel online travel agencies, Booking would have used the merger to 'expand its travel services ecosystem', with 'customer inertia' meaning that a 'significant share' of flight consumers would have remained within its platform.[64] According to the Commission's theory of harm, potential rival online travel agencies to Booking would have faced higher barriers to entry and expansion due to the amplified network effects generated by Booking's fortified ecosystem.[65] That the Commission's decision is under appeal[66] may come as little surprise and this should provide an important opportunity for the General Court to scrutinize the Commission's first application of a novel 'ecosystem theory of harm'. While it is not possible to fully engage with the merits of the Commission's decision in *Booking/eTraveli* at the time of writing, it is worth underscoring the reality that the Commission's approach would appear to risk ensnaring any merger involving the acquisition of complementors by an established firm benefitting from a strong market position in a core product offering.[67]

Turning attention to the Amazon ecosystem, it is the so-called 'flywheel' about which a theory of harm would arguably need to pivot. It has been posited by others that, with every acquisition that Amazon makes, the firm is steadily increasing its market power thanks to the 'insulating' effect that its ecosystem has on competition, which has the effect of strengthening its 'ability and incentive to impose anti-competitive and discriminatory terms on its customers and

[59] Case T-604/18 *Google and Alphabet v. Commission (Google Android)* EU:T:2022:541, para 116.
[60] *Anticipated acquisition by Microsoft of Activision Blizzard, Inc.*, Final Report (26 April 2023); *Anticipated acquisition by Microsoft Corporation of Activision Blizzard (excluding Activision Blizzard's non-EEA cloud streaming rights)* (13 October 2023).
[61] Bundeskartellamt Case B6-21/22 *Meta/Kustomer* (11 February 2022).
[62] Caffarra et al. describe how cases 'often used the concept just as "mood music" before falling back to traditional analysis'; see: C. Caffarra et al., '"Ecosystem" theories of harm in digital mergers: New insights from network economics, part 1' (*CEPR VOX EU*, 5 June 2023), available at: https://cepr.org/voxeu/columns/ecosystem-theories-harm-digital-mergers-new-insights-network-economics-part-1 (accessed 5 May 2024).
[63] Case M.10615 *Booking Holdings/eTraveli Group* (25 September 2023).
[64] European Commission press release, *Mergers: Commission prohibits proposed acquisition of eTraveli by Booking* (IP/23/4572, 25 September 2023) .
[65] Commission press release IP/23/4572 (fn 64).
[66] Case T-1139/23 *Booking Holdings v. Commission*, pending.
[67] For a similar analysis, see C. Nardini and A. Stenimachitis, 'Ecosystem theories of harm – a new risk or just a new word?' (*Compass Lexecon*, 29 January 2024), available at: https://www.compasslexecon.com/insights/publications/ecosystem-theories-of-harm-a-new-risk-or-just-a-new-word (accessed 5 May 2024).

competitors for whom it is an unavoidable trading partner.'[68] Hence, it has been argued, the acquisition of iRobot would have harmed competitors to and consumers of Amazon across its discrete lines of business while also driving Amazon Prime's lock-in 'as customers accumulate more and more Amazon smart home devices and become more immersed in Amazon's ecosystem' and ultimately cementing the firm's market position in the Internet of Things.[69] Although this novel theory deserves attention, it must not be forgotten that the evidentiary standard for mergers demands that the Commission demonstrates that it is more likely than not (the standard of proof) that the merger will cause a significant impediment of effective competition (the legal test). In the absence of traditional foreclosure, satisfying the requirement of a 'significant' negative effect on competition is likely to be challenging. Merger control is not necessarily designed to prevent small 'cuts' to competition, and it is by no means evident that a more interventionist approach to merger control would be a silver bullet. Indeed, without clear limiting principles, and a firm economic grounding that gives due consideration to the very real efficiencies that may arise, there is a risk that novel 'ecosystem theories of harm' may result in pro-competitive mergers being forestalled.

5. Unintended consequences

Ecosystem theory arguably offers as many insights into the benefits of ecosystem business structures as the potential anticompetitive harms arising therefrom. One of the problems associated with the prevailing eagerness to incorporate 'ecosystem theories of harm' into competition law analysis is that whenever a merger involving a so-called 'ecosystem orchestrator' emerges, attempts may be made to highlight potential negative effects at the expense of pro-consumer synergies. It also risks traversing a dangerous pathway towards 'populist' interventionism directed against a certain subset of digital firms. Although the Commission's published summary of its Statement of Objections in *Amazon/iRobot* is devoid of an 'ecosystem theory of harm', the Amazon/iRobot merger arguably fell prey to this phenomenon and may be described as one of a new category of digital mergers to which competition authorities feel compelled, by means of any available theory of harm, to object. This is particularly unfortunate as the merger highlights not only some of the pro-consumer benefits of ecosystems, but also exemplifies the reality that large firms such as Amazon frequently play a significant role in facilitating and accelerating innovation and economic growth.[70]

Notably, since 2016 iRobot has increasingly brought Amazon's market-leading cloud products into service as the information technology foundation upon which to build its 'smart home' offering.[71] As part of a set of Amazon Web Services (AWS) case studies, iRobot underscores the criticality of Amazon's serverless architecture in running its Internet of Things backend 'to manage billions of connected devices easily and securely.'[72] Specifically, it is stated that by 'building on AWS, iRobot finds problems faster, produces higher-quality code, and ultimately provides a better experience for customers.'[73] Furthermore, the advent of 'AWS RoboMaker' is cited as enabling iRobot to 'discover problems across different product lines via automated

[68] Smith (fn 5).
[69] Smith (fn 5).
[70] For the author's earlier articulation of this point, see Evans (fn 3).
[71] Amazon Web Services, Case Studies, *iRobot on AWS*, available at: https://aws.amazon.com/solutions/case-studies/innovators/irobot/ (accessed 5 May 2024).
[72] *iRobot on AWS* (fn 71).
[73] *iRobot on AWS* (fn 71).

testing', a solution that 'detected software defects in development, rather than production, and produces higher-quality code and products to customers.'[74] Indeed, although the ubiquitous phrase 'standing on the shoulders of giants' should be used cautiously, it is apparent that firms such as iRobot may have neither the financial capacity nor the technical capability to develop independently sophisticated information technology at the speed and scale necessary to compete assiduously to meet consumer demands.[75]

In fact, the decimation of iRobot precipitated by the abandonment of the deal, which immediately manifested in layoffs amounting to 31% of its workforce, a pause on diversified innovation, the departure of the CEO and Chairman[76] and a fall in its share price of more than 75% from before the Commission issues its Statement of Objections to the time of writing,[77] should be recognized as standing in diametric opposition to the broad objectives espoused, in particular, by a new generation of competition officials. In April 2024, Margrethe Vestager, Executive Vice-President of the European Commission asserted that: '[w]e need to bring down the old cliché that regulation goes against innovation. Quite the opposite. Laws exist to mitigate the risks, and open-up markets that have been closed down … So businesses can freely innovate. And so we can mobilise the public and private investments needed to be at the edge.'[78] By 'demobilizing' the private investments needed for iRobot to 'be at the edge' of the market for robot vacuum cleaners, described by Vice-President Vestager as 'part of the "smart home" revolution seeking to digitalise our homes and to make domestic life easier,'[79] the Commission's intervention has directly reduced the firm's capacity for 'free innovation'.[80] To be sure, *Amazon/iRobot* is a case in which the enforcement of merger control rules appears to have contributed to the partial 'closing down' of iRobot as a key competitive constraint in the market, described by Vice-President Vestager as 'one of the main robot vacuum cleaners suppliers in the European Economic Area' and 'well-known' for its 'flagship brand'.[81]

Indeed, perhaps one of the greatest challenges to restoring legal certainty in EU merger control will be to reduce the growing margin of discretion afforded to a Commission that exhibits remarkable inconsistency in its diagnosis of problems and application of discrete legal tools thereto. This is exemplified by the aforementioned speech in which Vice-President Vestager reflected how: '[y]ou look for where to buy a new kitchen robot? Immediately, you'll be served a list of preferred shops, put together by Google Shopping', using this to exemplify how 'a handful of players closed the gates of the digital marketplace' which has denied smaller firms the chance to compete and, consequently, deprived users of 'their ability to choose among options', with prices driven-up and choice and innovation driven-down.[82] Beyond the irony that, in *Amazon/iRobot*, the Commission claimed that European consumers 'particularly rely on

[74] *iRobot on AWS* (fn 71).
[75] For the author's earlier articulation of this point, see Evans (fn 3).
[76] iRobot News, 'iRobot Announces Operational Restructuring Plan to Position Company for the Future' (29 January 2024), available at: https://investor.irobot.com/news-releases/news-release-details/irobot-announces-operational-restructuring-plan-position-company (accessed 5 May 2024).
[77] The author's own calculations, based upon publicly available Google Finance share price data: fall in share price of 77.27% from the share price of USD 41.48 USD before the issuing of the Statement of Objections (24 November 2023) to the share price of USD 9.43 on 3 May 2024.
[78] M. Vestager, *Speech by Executive Vice President Vestager on technology and politics at the Institute for Advanced Study* (SPEECH/24/1927, 9 April 2024).
[79] Commission press release, STATEMENT/24/521 (fn 1).
[80] Vestager (fn 78).
[81] Commission press release, STATEMENT/24/521 (fn 1).
[82] Vestager (fn 78).

Amazon both in terms of product discovery as well as for their final purchasing decision',[83] despite clear competition in product search from *inter alia* Google Shopping, it is noteworthy that Vice-President Vestager points to the Digital Markets Act as a European regulatory solution that 'forces dominant players to open the gates of the market' by mandating quality of prominence between rivals in search results.[84]

Crucially, the unintended consequences of regulatory over-reach in *Amazon/iRobot* are not confined to the parties and risk a chilling-effect on innovation in digital markets. While it may be almost inevitable for the parties to an abandoned merger, together with those with certain economic interests, to make far-reaching claims, in this instance it seems difficult to reach an alternative conclusion. Notably David Zapolsky, Amazon SVP and General Counsel, stated upon abandonment of the merger that: 'Undue and disproportionate regulatory hurdles discourage entrepreneurs, who should be able to see acquisition as one path to success, and that hurts both consumers and competition – the very things that regulators say they're trying to protect.'[85] And this very much echoes reporting that: '[s]ome entrepreneurs are concerned that if Amazon can't buy a maker of vacuum cleaners, it sends a signal that it will be difficult for Big Tech to buy anything at all – and that might be a blow for their exit strategies and for innovation as a whole.'[86]

6. Conclusion

The *Amazon/iRobot* transaction may have been abandoned, but the questions it raises have by no means been laid to rest. The onus remains on the Commission to clearly explain why EU competition law and digital market regulation are insufficient to prohibit or deter the potentially anticompetitive conduct referred to in its Statement of Objections. This article has argued that, as a point of positive law and rule of practice, in assessing Amazon's incentives to foreclose, the Commission should have taken into account the substantive provisions of the Digital Markets Act as a key factor 'liable to reduce, or even eliminate' the incentives for Amazon to adopt the foreclosure conduct set out in the Statement of Objections. To the extent that the conduct at issue is captured by Article 6 of the Digital Markets Act, it would have been held to be *per se* unlawful, vigilantly monitored and investigated and the subject of substantial penalties. Furthermore, it has been argued that the corollary of legal certainty as to the *ex ante* unlawfulness of certain conduct under the Digital Markets Act must be legal certainty that mergers in which the theory of harm hinges on those conducts should, *ceteris paribus*, be cleared relatively straightforwardly by the Commission. Indeed, one of the key benefits for parties of the Commission's new *ex ante* approach should be a reduction in transaction costs associated with the consecration of digital mergers in the EU. Hence, the outcome in *Amazon/iRobot* should be an anomaly and, as such, represent an important lesson in unintended consequences for the Commission.

However, it cannot be ruled out that *Amazon/iRobot* stands rather as a harbinger of legal dissonance. A month after the abandonment of the deal, and in the wake of iRobot's decimation, Vice-President Vestager touted the Commission's approach as something of a success story,

[83] Commission press release, IP/23/5990 (fn 2).
[84] Vestager (fn 78).
[85] Amazon press release, *Amazon and iRobot Agree to Terminate Pending Acquisition* (29 January 2024), available at: https://press.aboutamazon.com/2024/1/amazon-and-irobot-agree-to-terminate-pending-acquisition (accessed 5 May 2024).
[86] J. Espinoza, 'Start-ups worry over EU's Big Tech crackdown' *Financial Times* (15 February 2024).

reiterating the vertical foreclosure theory of harm reliant on 'self-preferencing' and emphasising that 'Amazon abandoned the transaction after we raised our objections.'[87] If this remains the position of the Commission, then it is by no means inconceivable that it will require a timely corrective from the EU Courts to transform dissonance into harmony. Presently, for parties seeking to understand the prospects of a given merger deal, it will be essential not only to undertake a thorough assessment of the evolving EU case law and rules of practice, but to engage with the macro-level policy changes and academic theory influencing a new 'modernization' of the EU legal order.

[87] M. Vestager, *Speech by EVP Margrethe Vestager at the 22nd International Conference on Competition (Berlin)* (SPEECH/24/1243, 29 February 2024).