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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Lack of Effective Control on Killer Acquisitions in the Big Tech Market under EU Framework: Rethinking of EUMR Rules?

Big Tech Marketlerdeki Öldürücü Devralmalarda Yetersiz Denetim: AB Birleşme & Devralma Tüzüğünün Yeniden Değerlendirilmesi

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Abstract

Antitrust enforcement comprises a wide body of rules to control undertakings operating in specific markets. This study examines whether any rethinking of the EU Merger Regulation rules is required to capture transactions escaping antitrust scrutiny, also referred to as “killer acquisitions” where large incumbents buy out innovative start-ups with the principal incentive to pre-empt competition restraint in the future. Existing measures aim to exercise a sort of control for acquisitions that fly under the antitrust radar and fall short of addressing and preventing “killer” intentions occurring in specific product and service markets. It will further call for reform on the approach that competition authorities take while reviewing merger filings to adjust the tools for a better fit to scrutinize such killing strategies which would potentially result in harmful effects to the innovative market structure and eventually to consumer welfare. With the new generation of products in the digital markets, the traditional rules of competition law might fall short of effective solutions. Once given the theoretical background and the measures adopted at the Member State level and recent calls for strengthening competition law tools at the EU level, we aim to demonstrate the inadequacy of the existing rules to address the need for closer scrutiny over the tech giants, i.e., the GAFAM five, and we suggest adapted tools to ensure fair competition.

Keywords

Killer acquisitions, big tech, mergers & acquisitions, European Union Merger Regulation (EUMR)

Öz

Rekabet hukuku belirli pazarlarda faaliyet gösteren teşebbüsleri kontrol etmeye yönelik geniş bir kurallar bütününden oluşur. Bu çalışma rekabet denetiminden kaçırılan ve aynı zamanda “öldürücü devralmalar” olarak bilinen, büyük işletmelerin yenilikçi girişimleri (start-up) sadece pazar dışı bırakmayı ve bilhassa gelecekteki bir rekabeti ön almayı amaçlayan devralma hareketlerini kontrol altına almak adına AB Birleşme-Devralma Tüzüğü kurallarının yeniden düşünülmesinin gerekli olup olmadığını tartışmaktadır. Rekabet denetimi radarının altında kalan ve belirli mal ve hizmet sektörlerinde oluşturulan bu “öldürücü” nitelikteki devralmalar ile bunların önlenmesine karşı mevcut düzenlemeler yetersiz kalmaktadır. Çalışma aynı zamanda yenilikçi pazar ortamı yapısına ve nihayet tüketicilerin refahı üzerinde muhtemel zararlı etkilere yol açabilecek bu öldürücü stratejilere karşı yerel rekabet otoritelerince birleşme-devralma izinlerinin değerlendirilmesinde kullanılabilecek yeni yöntemlere işaret edecektir. Dijital pazarlardaki yeni nesil ürünler karşısında geleneksel kurallar etkin çözümlerin gerisinde kalabilir. Teorik arka plan, AB üye devletler düzeyinde alınan önlemler ve son dönemde rekabet hukuku araçlarının güçlendirilmesi yönündeki AB düzeyindeki çağrılara yer verildikten sonra halihazırdaki mevzuatın teknoloji devleri, örneğin GAFAM beşlisi, üzerinde yakından bir takibin ne denli eksik kaldığı gösterilecek ve adil bir rekabet ortamı için önerilerde bulunulacaktır.

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I. Introduction

The concept of killer acquisitions comprises the acquisition of nascent competitors that is likely to threaten the market position and profitability of the dominant player in the future and pre-emption of future competition. Our study will elaborate on the outcomes of such acquisitions, dive into the legal toolbox suggested to prevent anticompetitive conduct while at the same time focus mostly on acquisitions of start-ups by large incumbents which are trying to kill the competitive gameplay and pre-empt future threats for the incumbents' market position. Therefore, our main focus will be on mergers escaping the merger control and notification requirements due to the lack of necessary thresholds that should be met at the EU level.

To that extent, we deem it proper to introduce and distinguish other concerns and outcomes along with the killer acquisitions, as they also appear to be a threat to consumer welfare. Mainly, when small start-ups are bought by digital key players, this might lead to the strengthening of the dominant power of acquirors, and consumers will eventually be unable to switch to other products since the market incumbents are so strong, and finally, entry into the market will become more difficult.

Silicon Valley's "if you can't beat them, buy them" approach is usually the simplistic explanation of the M&A activity of the big players in the market. If we are to take the issue seriously, one needs to opt for alternative remedies to ensure an effective control for such mergers potentially risking future competition and innovation in the market.

II. Killer Acquisitions in Big Tech Industry

A. Concept of Killer Acquisition

1. Origins and Assessment

Economic development throughout the end of the 20th and the beginning of the 21st century has seen the rise of innovative technologies with increased user networks that one would unlikely expect on such a fast-moving scale. This latter has led companies to attract more people with new business methods and, unlike what has been taught, competition between the online platforms has not led to balanced market players; instead, several big players, also called gatekeepers, have emerged.[1]

In this environment, competition law has been at the "epicentre of this re-evaluation process".[2] Many competition authorities in the world seek for tools intended to

1 Yves-Alenxandre de Montjoye, Heike Schwitzer and Jacques Crémer, 'Competition in the Era of Digitisation' (2019) <https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1#> accessed 1 December 2020, 20.

2 Kris Van Hove, 'Revising the Competition Law Rulebook for Digital Markets in Europe: A Delicate Balancing Act' (Competition Policy International, 11 October 2020) accessed 10 December 2019.

provide an enforced and better antitrust scrutiny in an effective manner to reduce the anticompetitive effects caused by these online platforms, i.e., the gatekeepers. Several denominations are used to address and categorize the players in this big tech market, such as platforms with a "strategic market status"[3], enterprises with "bottleneck power"[4] or simply "structuring digital platforms"[5] (*plateformes numériques structurantes*).[6] Clearly, in terms of consistency and uniformity, there is a common approach to address them as **incumbent firms**. Whatever the denomination would be, our analysis has its core focus relying on mainly five tech giants shortly called the "GAFAM" (Google, Amazon, Facebook, Apple & Microsoft).

In the beginning, the term killer acquisitions was first brought into the literature in a working paper by Cunningham, Ederer and Ma, who analyzed the anticompetitive mergers in the pharmaceutical sector and used the term to define those acquisitions of innovative start-ups by incumbent firms to pre-empt future competition by eliminating the potential of competing products.[7] Accordingly, the sole and only way to classify the acquisitions of a nascent competitor as "killer" would be those of innovative start-ups with overlapping products, acquired by the incumbent.[8] There can be indeed divergent scenarios of whether such a takeover would likely result in the distortion of competition in the market. Yet, prima facie, one may think about the business strategy to shut down the innovative production post-merger to eliminate potential competitors in the market or terminate the R&D because the incumbent firms deemed to have their own product developed instead of developing the acquired product that overlaps with the existing R&D or a substitutable product already in the market.

On the other hand, Argentesi and others elaborate on the mergers having anticompetitive effects on development based on two ways.[9] First, the incumbent firm acquires an actual or potential competitor that directly result in reduced competition, or secondly, through an indirect way where the incumbent acquires a nascent competitor in which the latter provides some complementary product that may willingly appear as a potential threat to the current market power of the former.[10]

Coming back to the first samples of this popular concept that were dealt with in

3 Jason Furman and others, 'Unlocking Digital Competition' (2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf> accessed 15 December 2020.

4 Stigler Committee, 'Digital Platforms: Final Report' (2019) <https://www.chicagobooth.edu/research/stigler/news-and-media/committee-on-digital-platforms-final-report> accessed 28 December 2020.

5 Autorité de la concurrence, 'Contribution de l'Autorité de La Concurrence Au Débat Sur La Politique de Concurrence et Les Enjeux Numériques' (2019) <https://www.autoritedelaconcurrence.fr/sites/default/files/2020-02/2020.02.28_contribution_adlc_enjeux_num.pdf> accessed 27 February 2021.

6 Damien Geradin, 'What is a digital gatekeeper' (The Platform Law Blog, 5 October 2020) accessed 27 February 2021.

7 Colleen Cunningham, Florian Ederer and Song Ma, 'Killer Acquisitions' (2020) 129(3) Journal of Political Economy, 649.

8 ibid 16.

9 Elena Argentesi and others, 'Merger Policy in Digital Markets: An Ex-Post Assessment' 7985 Cesifo Working Papers 1, 2.

10 ibid.

the pharmaceutical industry, Cunningham and others demonstrate basically that "*a combination of choice*" is an effective element to assess what kind of anticompetitive conduct might result in the post-merger of a nascent competitor or say innovative start-up. They observe that incumbent firms with overlapping drug projects in the pharmaceutical industry are more likely to discontinue R&D projects post-merger, and they came up with statistical data in that regard.[11]

Particular importance in this subject matter resides in the question on how to ensure an effective antitrust scrutiny for the abovementioned acquisitions which might escape the merger control regime under the relevant framework. Our study will lean mostly towards the EU framework which relies on Merger Regulation No 139/2004 on the control of concentrations between undertakings.[12] Yet, some comparisons will necessarily be made with the US in terms of the current debates regarding the antitrust scrutiny on GAFAM players.

The famous Silicon Valley approach known as "*if you can't beat them, buy them*" discomforts several antitrust authorities throughout the world. Eventually, this approach leads to a rise of new landmarks and debates forcing antitrust authorities to develop a toolbox with a better fit for better scrutiny. In the EU for instance, the European Commission came up with quite a recent study called Report on Competition in the Era of Digitalization. Meanwhile, several national authorities also published a number of detailed reports focused on competition law and digitalization, such as the Furman[13] & Lear Report[14] of which the UK is the first example. We can observe similar trends worldwide, for instance, the Digital Platform Inquiry Report[15] in Australia, the Stigler Report[16] in the US and many others from other international organizations, e.g., the OECD, or research centers.

Nevertheless, one should also point out the potential efficiency that could be achieved through the incumbent firm digesting smaller start-ups. Truly, tech companies can be a better fit for integrating innovative technologies into their system in order to develop a variety of improved products and offer consumers better quality with increased user experience. They are likely more eager to gather human capital that

11 Cunningham, Ederer and Ma (n 7) 21.

12 Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L088.

13 Furman and others (n 3).

14 Lear, 'Ex-Post Assessment of Merger Control Decisions in Digital Market' (2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803576/CMA_past_digital_mergers_GOV.UK_version.pdf> accessed 15 December 2020.

15 Australian Competition & Consumer Commission, 'Digital Platform Inquiry Report' (2019) <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report> accessed 28 December 2020.

16 Stigler Committee (n 4).

would be used in different projects, a phenomenon mostly referred to as acqui-hiring.[17] These companies, hence, have a greater motivation to deploy the human resource in their project development and the acquisition of smaller start-ups may serve to gather talented people into the same working environment. However, it is not clear on these separate occasions in which way they would prefer when entering into the acquisition; either to bury the innovative competitors[18] or instead contribute further into the development process.

A few last words before moving on to the next sections can be said as to why we treat tech firms separately, or why trying to define a distinctive scope has in fact two basic reasons. Firstly, the current competition in relevant markets of GAFAM would **barely** allow small-nascent competitors to enter into the market, while the competition in the market is a rather insignificant competition for the market, due the barriers to entry.[19] The main difficulty is caused by the mere fact that actual competitors appear to be a threat on competition rather than entry of smaller enterprises[20], a dilemma explained by "innovative start-up disrupts current business of existing incumbents." From the economic theory point of view, competition for the market can generate cost reduction and efficiency for the market itself. Yet, reduced innovation along with a high level of barriers to entry potentially lead to strengthened monopoly power in place seized by the so-called big players. To put it otherwise, it is argued that competition for the market will often increase the outcomes that a monopoly can generate[21], whereas it is worth highlighting how long such efficiencies transferred to consumers might carry on or even whether it stands in favor of innovations in the market. Considering the fast-moving market structure in technology markets[22], the incentive to acquire a nascent competitor is a much more appealing strategy to preserve one's own market power. This is what seems problematic.

Truly, one will barely make sure that the final product developed by a monopolist would be the best all-time product among others[23], on the contrary, there could always be an alternative that might be better. We believe and argue that giving credibility to innovation should in all circumstances be left open, in which the latter will guarantee a continued development of innovative technologies, if not only, then through an

17 Amy C Madl, 'Killing Innovation? Antitrust Implications of Killer Acquisitions' (2020) 38 Yale Journal of Regulation Bulletin 28, 51; see also Axel Gautier and Joe Lamesch, 'Mergers in the Digital Economy' (2020) CESifo Working Paper 8056, <https://linkinghub.elsevier.com/retrieve/pii/S0167624520301347> accessed 9 February 2021 2.

18 ibid.

19 Oliver Latham, Isabel Tecu and Nitika Bagaria, 'Beyond Killer Acquisitions: Are There More Common Potential Competition Issues in Tech Deals and How Can These Be Assessed?' (2020) 2(2) Antitrust Chronicle 26, 28.

20 PA Geroski, 'Competition in Markets and Competition for Markets' (2003) 3(3) Journal of Industry, Competition and Trade 151, 151.

21 Kevin Bryan and Erik Hovenkamp, 'Startup Acquisitions, Error Costs, And Antitrust Policy' (2020) 87(2) University of Chicago Law Review 331, 331.

22 Kristen C Limarzi and Harry RS Philips, '"Killer Acquisitions," Big Tech, and Section 2: A Solution in Search of a Problem' (2020) 2(2) Antitrust Chronicle 7, 9.

23 Geroski (n 20) 160.

improved level of competition allowing smaller businesses to challenge the current variety of products. This particular concern has historically been at the epicenter of change in antitrust policies on new economies, say high technology markets[24].

Secondly, another fundamental reason to treat and put tech firms under close observation is that innovative but rather smaller start-ups being acquired can have their products offered to the market discontinued, and the final effects of the merger policy might lead to irrevocable outcomes to the detriment of consumers, as the killing strategy may "distort the rate and direction of innovation" at the expense of a reduced welfare for society.[25] In view of valuable developments in the tech industry, it should be noted that a significant part of contributions into innovation is generated by start-ups.[26] Without prejudice to an adoption and enforcement of antitrust rules that might reach an excessive interference to the proper functioning of a liberal market economy, merger policies should be reviewed in the sense that smaller businesses would be able to hold on for the sake of innovations.

2. Pre-emption of Future Competition

The killing intention for large incumbents starts with a strategy to diminish the contestability of their market power, and thus, limiting the entry as much as possible.[27] Where the deterrence strategy seems not to be working, an alternative is to buy out and shut down the R&D projects of the target firms, thus, enabling them to pre-empt future competitive constraints.[28]

This issue led us, however, to confront the following dilemma: overcontrol exercised on the market might develop to the detriment of free market economies, without letting the invisible hand of the market settle the "product and price" freely in the market. Moreover, any entrepreneur would likely sell the new product that it has developed to bigger players, to gain some profits as return to the investment that they made.[29] Therefore, the more restrictive the potential exit is, the more disincentivized the inventors would likely be to invest in research and development; as a result, the start-ups "may not have the same incentives to innovate in the first place".[30]

As an initial matter, the potential to innovate a new product and ultimately sell it off is a key driver of innovation which appears to be a classic lifecycle for certain

24 David S Evans and Richard Schmalensee, 'Some Economic Aspects of Antitrust Analysis In Dynamically Competitive Industries' (2001) 8268 NBER Working Paper Series, 2.

25 Latham, Tecu and Bagaria (n 19) 28.

26 Bryan and Hovenkamp (n 21) 337.

27 ibid.

28 Cunningham, Ederer and Ma (n 7) 38.

29 Jacqueline Grise, David Burns and Elizabeth Giordano, 'The No Kill Zone: The Other Side of Pharma Acquisitions' 2020 2(2) Antitrust Chronicle 19, 21; see also Cunningham, Ederer and Ma (n 7) 50-51.

30 ibid.

industries like biopharma where the founders of undertakings and investors expend substantial time, money and effort developing new products. Without the potential for a successful exit through a sale or a license, investors may not have the same incentives to infuse money into development, thereby, companies and founders may not have the same incentives to innovate in the first place.[31] Analysts share this view as well.[32]

Several different configurations can exist: acquire to pre-empt the future competition pressure or acquire to reinforce its market position in the same (or adjacent) market.[33] It is therefore not limited to pre-emption only. Hence, some argue that the essential motivation among GAFAM is to acquire innovative assets together with the intention to increase market power.[34] Today, such kind of acquisition policies, also called by certain authorities as "consolidating or encompassing", are not being controlled to great extent.[35]

3. First Cases Involving the Pharma Industry

As previously mentioned, the concept originally relates back to the pharmaceutical industry, with the first cases involving the pharma giants. One of the characteristics in this sector is the innovation efforts that are much higher in cost, depending on costly R&D projects in particular. As an illustration, the acquisition of Synacthen by Questcor alerted the FTC on the grounds that the acquisition in place was targeted on a nascent player challenging the monopoly.[36] Moreover, thinking about inevitable side factors, like IP rights in the pharmaceutical sector, companies may attempt to acquire the smaller competitors to prevent "cannibalization of its own product" due to overlapping of the drugs offered, and eventually, to protect profitability.[37]

Some other possible ways for an incumbent pharma firm to subsequently terminate a project that overlaps would be the intra-project selection and class-based drug problem.[38] The first scenario involves an acquirer being found to choose a more prospective product among its own/already developed drug and the acquired product. Based on scientific analysis, the firm will likely try to opt for a more prospective project in drug research so as to carry on its R&D activities with the selected one, and totally abandon the second product. As to the second, more access to data for therapy and potential side effects of drugs facilitate opting for abandoning the development

31 ibid – see also Cunningham, Ederer and Ma (n 7) 50-51.

32 Gordon M. Phillips & Alexei Zhdanov, 'R&D and The Incentives from Merger and Acquisition Activity, National Bureau of Economic Research' (2012) Working Paper 18346 <https://www.nber.org/papers/w18346.pdf> accessed 29 December 2020.

33 Autorité de la concurrence (n 5) 10.

34 Axel Gautier and Joe Lamesch (n 17) 27.

35 Autorité de la concurrence (n 5) 10.

36 Federal Trade Commission (FTC) and others v. Mallinckrodt Ard Inc. (Questcor Pharmaceuiticals) (2017) 1:17-cv-00120.

37 Madl (n 17) 30-31.

38 ibid 35.

of either product. To put it otherwise, post-acquisition, the firm would have a larger database in terms of scientific outputs for activity ratio of other products together with and compared to already existing one(s).

Distinctively to characteristics for the pharma industry, innovation in the digital world is much more different. An innovative product in digital markets, namely in the big tech industry, will concentrate around new facilities and features, and bring them into a new platform with a never-ending phase of development but in constant evolution.[39] One can also think that the place for IP rights is somewhat less important while the benefits would generally be granted to those who will be the "first to the market".[40]

Furthermore, contrary to the pharma industry, innovation theories of harm in digital markets does not necessarily lead to the discontinuation of the acquired product. Instead, the acquiring firm would likely use a new product with its own brand name and incorporate it under its own network, particularly when the "product's value is based on its users".[41] This will also be one of the reasons why killer acquisitions in the tech sector raise more ambiguity for the analysis to observe whether the transaction is likely to distort competition and innovation in the market.

B. Concerns about Consolidation in the Market

1. Measuring the Effects of Killer Acquisitions

Generally speaking, any merger that would "significantly impede effective competition" (SIEC) is seen as incompatible under the EU merger regime.[42] The problem with the incumbent firms acquiring the smaller relates also to the difficulty for users to switch to alternative products. They are positioned in a manner difficult to dislodge even when the users would be provided an entirely facilitated system to transfer their data to another system.[43] The competition lawyers are highly concerned with the inability of users to switch-away to alternative platforms. It is thus likely for large incumbents in the digital markets to have "strong incentives to engage in anticompetitive behaviour."[44] For this reason, we would like to start from the very basics before moving into the hot topics in this area.

39 Montjoye, Schwitzer and Crémer (n 1) 35.

40 ibid.

41 Gautier and Lamesch (n 17) 4.

42 Council Regulation (n 12) art.2.

43 Montjoye, Schwitzer and Crémer (n 1) 36-37.

44 ibid.

a. Plausible Theories of Harm

There can be divergent categories of harmful effects resulting from mergers and acquisitions related to antitrust scrutiny, for instance, consumer theories of harm, loss of potential competitor theories of harm, and so forth. Broadly speaking, every single category basically relates and tries to find evidence of why a certain behavior causes damage to competition.

Since our subject mostly concentrates on the potential threat to innovativeness of the market, one can think about the structure where the loss of innovation shall be first considered as a plausible theory of harm. It is hence made the ground by the European Commission while opposing to the merger of firms in certain industries, like pharma (Dow/Dupont Case[45]). The technological improvements with newly developed products can break through the existing market, leading to change in the technological paradigm. Thus, with the more recent approach taken by the European Commission further to merger review given in Dow/Dupont filing, innovation theories of harm are further considered in merger cases. Yet, there seems to be no clear distinction made by the Commission on where to draw the line between innovation theories of harm and the ones related to potential competition concerns.[46] It should be noted that regarding the loss of a potential competitor, the Commission has addressed the question in merger filings, such as the one in Google/DoubleClick, and concluded that a sufficient number of other competitors that could maintain sufficient competitive pressure would likely remove the concerns associated to post-merger effects.[47]

From the legal point of view, some suggest that the loss of a potential competitor as a result of the acquisition of an entity being a nascent competitor to the acquiring party should be taken into account as a form of nascent firm theory of harm.[48] Hence, a killer acquisition will likely cause the loss of an innovative product as well as the loss of a potential competitor, therefore, combining both nascent and innovative theories of harm. On the other hand, some others suggest that the killer intention in mergers and acquisitions encompass the loss of potential competitors but also causes threat to products that will be killed post-merger, whereas, loss of potential competitor theories of harm will rather be limited to the disappearance of an entity but not the product itself.[49]

45 Declaring a concentration to be compatible with the internal market and the EEA Agreement (Case M.7932 – Dow/DuPont) Dow/Dupont (COMP/M.7932) European Commission Decision C(2017) [1946].

46 Andrea Lofaro, Stephen Lewis and Paulo Abecasis, 'An Innovation in Merger Assessment: The European Commission's Novel Theory of Harm in the Dow/DuPont Merger' (2017) 32(1) Antitrust 100.

47 *Google/DoubleClick* (COMP/M.4731) European Commission decision C(2008) 927.

48 Vaelav Smejkal, 'Concentrations in Digital Sector - A New EU Antitrust Standard for "Killer Acquisitions" Needed?' (2020) 7(2) Journal for International and European Law, Economics and Market Integrations 1, 3.

49 OECD, 'Start-Ups, Killer Acquisitions and Merger Control' (2020) <www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control-2020.pdf> accessed 3 February 2021, 10.

b. Conglomerate Effects

One particular aspect in merger filings is to determine market positions of the parties to merger. Typically, non-horizontal mergers would be unlikely to raise anticompetitive concerns while the horizontal mergers have more potential to distort effective competition, reducing the benefits that could be transferred to consumers absent the merger. This view is also confirmed by the European Commission when we read the Non-Horizontal Merger Guidelines.[50] It should be noted that conglomerate mergers are at stake where it is difficult to conclude where the parties are either in horizontal or non-horizontal relationships.

Given the characteristics of big tech markets, one would barely intend to compete with large incumbents already existing in the market although elements for potential competition remain to be significant. We believe that most of the uncertainties appear between the mergers of companies under the conglomerate market position. Otherwise, authorities may -if not always- easily detect and make the analysis for potential restriction that the merger might cause in the relevant market. On many occasions, the European Commission had no difficulty assessing the number of competing entities, market shares and other elements in merger filing and came up with precisions whether to clear or block the merger. Google/DoubleClick was a clear example where it held among two potential competitors that there will be many other competitors capable to make a pressure on the merged entity.[51]

So, the particular attention, in our view, should be focused on conglomerate effects in strict correlation with the incumbent's ability to leverage market power into adjacent markets. Some findings suggest that M&A activity carried out by the GAFAM five seems not to lead to an increased global competition *inter se*, and we are unable to show clear evidence to conclude that killer acquisitions are "widespread".[52] Yet, this is exactly the point we are trying to explain; that one must always opt for the worst-case scenario meaning that the anticompetitive effects may unlikely be recompensated once the merger is cleared. Therefore, it is worth addressing effective remedies and potential solutions to detrimental transactions that occur in big tech M&As due to uncertainties.

c. Leveraging Market Power

In relation with the conglomerate effects of a merger, we need to add that one of the primary concerns in this context will be the foreclosure of the market. Post-merger, the entity may be able and have incentive to leverage its market power from one market to another by means of different practices such as tying or bundling. Although we lack

50 European Commission, 'Non-Horizontal Merger Guidelines (2008/C 265/07)' <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:265:0006:0025:en:PDF>.

51 Argentesi and others (n 9) 9.

52 Gautier and Lamesch (n 17) 4.

an exact definition of what amounts to leveraging, the European Commission suggests that the term implies the ability to increase the sales of a product in one market (tied or bundled market) by virtue of the strong market position of the product to which it is tied or bundled.[53]

The incumbent firm finds itself at an advantage to use this strong market position in pre-emptive buyouts, which is also called "to entry for buyout" in the economic literature.[54] It should be noted that it is a common approach in start-up businesses to primarily gain and attract consumer attention instead of profitability in the business or reaching bigger monetary turnover. The Facebook/WhatsApp merger, for instance, raised the concern of the European Commission on the grounds that Facebook might be able to dispose of the users' data in WhatsApp in order to obtain money by selling the data to targeted advertisements, thus strengthening its position in the advertisement market.[55] It was only then cleared by the Commission after having convinced them that there will still be a sufficient number of alternative advertisement providers in competition with Facebook.[56] Nowadays, the tech giant is facing new investigations after having announced its updates with a reviewed privacy policy that will be used in the messaging application raising new debates under the interplay between competition law and GDPR, which the issue will, however, not be dealt in more detail within the scope of this study.

d. Effects on Innovation

In the course of its development, antitrust law has accepted new forms as to the theories of harm in the assessment of the restriction of competition. Loss of innovation was hence included and added to list, preventing anticompetitive practices when the conduct of parties or concentrations would likely affect innovativeness in the market. Further light should be shed on the effect on innovation with a key economic factor: cannibalization.[57] The closer the competition is, the higher the degree of cannibalization. There exist opposing views on the typology of the market that would more likely allow a broader field for innovation, either highly concentrated markets or less concentrated markets.[58] It should be noted that cannibalization occurs where the products offered by distinct entities pre-merger would likely increase the incentive to innovate and conduct more R&D activities so that the products brought into the market could compete with each other. However, profitability achieved from both products will decrease due to the cannibalization effect post-merger, therefore cutting down incentives to innovate as well.

53 European Commission, 'Non-Horizontal Merger Guidelines (2008/C 265/07)' (n 61).

54 Argentesi and others (n 9) 9.

55 ibid.

56 ibid.

57 Lofaro, Lewis and Abecasis (n 46).

58 ibid 4.

When we observe the strategy in the M&A activity of the GAFAM five, we may find several targeted firms whose products are discontinued by the incumbent post-merger.[59] We should understand discontinuation in any form where the product offered by the merged/acquired entity is taken out of the market, switched with the incumbent's substitutable product, or no longer supplied, nor upgraded. Gautier and Lamesch observe that in 60% of the acquisitions carried out by GAFAM, the acquired products were discontinued while only in 27% of the cases the acquired brand name remained.[60]

A dilemma with the effect on innovation has its pros as well. Generally, start-ups may lack the necessary resources to develop their products due to several reasons including, but not limited to, the popularity of the brand (in conjunction with network effects), insufficiency of funds, and lack of an effective business strategy and team. While the acquisition of small innovations by incumbents seems to benefit the investment required for innovations, we can still claim that radical innovations remain limited if the start-ups succeed in developing blasting and game-changer innovation that will devastate the product demand. Cabral suggests that start-ups have less incentive to invest in radical innovations but are more likely to develop incremental innovation and, as such, they will have more value if transferred to a dominant firm, as a result of a merger.[61]

2. Efficiencies Outweighing Anticompetitive Effects

In the absence of efficiencies, the merger of two firms with potential competitive restraints will likely be seen as a problematic concentration, and depending on the relevant market may even seem like a threat to overall competition in the market. Yet it could be argued that the post-merger period will allow greater innovation and/or benefit to consumers that the merged entity could never achieve without the merging party's market power and structure being affected. It is certain, on the other hand, that authorities may allow mergers where any constraint seems likely to occur post-merger, which is to say without necessarily proving, for the merging party, that the acquisition will result in greater innovation or benefit to consumers.

To give an example, we may look at the acquisition of Waze, a navigation application bought by the tech giant Google which the UK Competition and Market Authority (CMA) cleared on 11 November 2013. Two theories of harm were considered relevant. First, whether the incentive to innovate could be reduced as a result of the acquisition, and second whether Waze may potentially become a "disruptive force" in the market

59 Gautier and Lamesch (n 17) 4.

60 ibid.

61 Luis MB Cabral, 'Standing on the Shoulders of Dwarfs: Dominant Firms and Innovation Incentives' (2018) CEPR Discussion Paper <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3235598> accessed 29 December 2020.

over the long term.[62] The UK authority answered the first issue by taking into account existing competing entities and has not seen any restriction of competition resulting from the acquisition. With regards to potential competition pressure that Waze might emerge to in the future, it is avoided to rely solely on hypothetical findings and no competitive concerns were found due to the uncertainty of the alleged potential.[63] It is clearly understood that assessment of evidence to potential competition and loss of potential competitor as a theory of harm is interpreted narrowly although Waze could be deemed as a promising mobile application.

Acquisitions raise, however, concerns among the competition authorities in certain situations and therefore alert the authorities not to clear or allow the transaction to proceed unless shown further efficiencies that could be achieved through the merger. In digital markets, for instance, incumbent firms may acquire not only new entrants to prevent them from emerging but also redeploy the facilities within their structure, such as the use of talented people/employees, customer networks, or new technologies.[64] Hence if its market inputs are costly, acquiring a new entrant can be an efficient and a less costly way to obtain such inputs.[65] So, the following measuring elements are mostly relied on: whether any greater innovation (1) can be potentially transposed to consumers (2), or not.

III. Deficiencies of the Existing Rules & Filling the Gap under the Current Framework

A. EUMR: Lack of Effective Control?

1. Monetary Threshold Difficulty

The EU merger control regime is primarily based on the community dimension aspect, below which Member States will have their own jurisdiction and rules applicable at the domestic level. The community dimension, on the other hand, relies on the monetary turnover of the merging firms, or to be more precise those involved in concentration which the latter might appear in 3 different forms: acquisition of undertaking, merger, and full function joint-venture created on a lasting basis.

Two alternatives may appear with the community dimension. First, the scenario involves parties to transaction with a combined worldwide turnover of over € 5,000 million and the EU-wide turnover for each of at least two of the firms of over € 250

62 Argentesi and others (n 9) 28.

63 ibid.

64 Marc Bourreau and Alexandre de Streel, ‘Big Tech Acquisitions: Competition & Innovation Effects and EU Merger Control’ (2020) Cerre <https://cerre.eu/publications/big-tech-acquisitions-competition-and-innovation-effects-eu-merger-control/> accessed 15 February 2021, 8.

65 ibid.

million. If these thresholders are not met, one may also consider a second alternative that requires parties to have a worldwide turnover of over € 2,500 million and a combined turnover all together of over € 100 million in each of at least three Member States and lastly, a turnover of over € 25 million for each of at least two of the firms in each of the three Member States included. In this scenario, at least two of the firms involved shall have an EU-wide turnover of more than € 100 million.[66] It is provided that parties may seek to escape the clause where they achieve more than two thirds of each of their EU-wide turnovers within the one and the same Member State. Approximately 300 merger filings are typically notified to the European Commission annually.[67]

The difficulty with monetary thresholds lies in transactions with smaller start-ups lacking the necessary capitalization for thresholds to trigger the EU merger control. The idea behind this suggests that not all transactions for companies with small market shares and/or monetary turnover should be considered anticompetitive, and the latter might only have a minor impact on the market post-transaction. We consider, however, that large incumbents, such as big tech companies by acquiring smaller start-ups, should still be subjected to merger control since almost every start-up with a promising product focuses merely on establishing and growing a customer base for themselves instead of the growth of monetary turnovers or their profits.[68] For this specific reason, the acquisition of Instagram was not reviewed by the European Commission, nor was WhatsApp except that a referral by the Member States had been used.[69] Moreover, we not all referrals are made under the same reasoning, as the Member States may prefer to refer the merger control to the European Commission without the turnovers usually meeting thresholds at the EU level, or the concerned parties may request and seek referral options through their notification originally addressed to a national authority.

With all threshold systems in mind, the question can be asked how certain acquisitions of GAFAM are reviewed by the European Commission without meeting the thresholds, including but not limited to Apple/Shazam (2018), Microsoft/LinkedIn (2016), Facebook/WhatsApp (2014) and Google/Doubleclick (2008), which all were approved by the latter. For instance, the review could not have been made for the acquisition of Shazam by Apple if the Austrian competition authority, together with other Member States' authorities, hadn't sought a referral mechanism under art.22(1) of the EUMR.[70] The Facebook/WhatsApp merger, on the other hand, was a result of the notifying parties themselves requesting a referral before the European Commission to

66 Council Regulation (n 12).

67 Statistics on Merger cases (European Commission) <https://ec.europa.eu/competition-policy/mergers/statistics_en> accessed 02.03.2021

68 Bourreau and de Streel (n 64) 15.

69 ibid 15.

70 David Pérez de Lamo Assessing 'Killer Acquisitions": An Assets and Capabilities-Based View of the Start-Up' (2020) 2(2) Antitrust Chronicle 50, 53.

review the merger filing, under art.4(5) of the EUMR, thus using a different mechanism than the referral by the Member States themselves.[71] The EUMR provides some means that could potentially be used to keep up with these mergers to some extent. Yet, compared to the total number of M&A activities held by GAFAM five, the mergers or acquisitions reviewed by the Commission remain quite limited, and most of these still escape antitrust scrutiny.[72]

2. Invisible Concentrations

Mostly, when we talk about outcomes of mergers and acquisitions regarding anticompetitive restraints, the objective of antitrust scrutiny is to prevent concentrations potentially resulting in restriction of competition in a relevant market. Many scholars have conducted in-depth research on the total acquisitions of the GAFAM five, classifying these devastating activities to take over promising enterprises eventually to be incorporated into their business. To give a number, 299 acquisitions were carried out together by Google, Amazon, and Facebook in the 2008-2018 period. Each of them acquired, respectively, 168, 71, and 60 companies.[73] If we take the scope of these transactions limited to EU-wide acquisitions, the number would likely reduce by more or less half. Nevertheless, it seems more pragmatic to take a more general approach, say global, as similar discussions are going on through other jurisdictions, mainly in the US. Overall, M&A activity held by GAFAM remains significant, with slight fluctuations; another 175 acquisitions were made in the 2015-2017 period by all these big five.[74]

Another study on this issue found that only a small number of acquisitions, from among a total of 409, made by GAFAM were related to the core business of these incumbents.[75] Accordingly, it was found that only 33 acquisitions (equal to 8 percent of the total) appear to be in the killer zone, or at least of nascent competitors, either the ones in direct competition at the horizontal level or in a vertical structure with products related to or substitutable to the incumbent's own product or that it could be evolved into likewise.[76] Similarly, several scholars provide that only a few acquisitions seem to be "killer"[77] and hence there is no presumption as to whether concentration causes anticompetitive restraint. It is claimed that apart from the necessary analysis case by case for each acquisition of this nature, there are rooms for features with this theory

71 ibid.

72 Gautier and Lamesch (n 17) 4.

73 Argentesi and others (n 9) 14.

74 Gautier and Lamesch (n 17) 15.

75 Latham, Tecu and Bagaria (n 19) 30.

76 ibid 30-31.

77 Gautier and Lamesch (n 17) 15.

of harm[78] when the GAFAM five strengthen their market positions more and more, leading to overconcentration within their relevant business world. For these reasons, we witness the various additional measures and legislation taken by Member States within the EU that we will mention in the subsequent section, national law backed antitrust scrutiny to prevent the anticompetitive concentrations which are invisible to the Commission at EU level.

B. Measures Proposed by the Member States

1. Cutting Down the Thresholds

Among many other options, one solution to police invisible concentrations is to cut down the monetary thresholds under national jurisdiction, determining relatively low thresholds of turnovers for both acquiring and acquired companies. It is accepted that lowering the threshold will indeed give the ability to enforce more scrutiny on mergers escaping the control.[79] The balance shall be maintained, however, between the number of merger filings notified and the burden of review with more filings that the authorities are going to deal with. It is further problematic with small start-ups with lower annual turnovers, but which appear to be potential targets for large incumbents, as they might end up with a takeover of high transaction value regardless of the turnover. This is because such start-ups seem quite promising to large players, or -if the case may be- a potential threat to their monopoly power. In this regard, reducing the thresholds for obligatory notification is far from an adequate solution alone unless it is used with other supportive mechanisms such as transaction value-based control or *ex-post* control.

In that regard, the Commission's Chief Competition Economist came up with the following example: "If we are to use a net with finer mesh, we will catch more small fishes that we lack necessary resources to deal with".[80] From this perspective, some argue that completely removing the threshold criteria for the target (or at least lowering it) while at the same time introducing for the acquirer an exclusive notification system for digital firms, could be a solution to capturing escaped transactions.[81] It looks overcomplicated to subject operators to divide acquisitions according to relevant markets and revenues by way of a differentiated turnover threshold system. Instead, we would propose a separate classification of platforms for big tech firms, among other proposals for solutions, as outlined below.

78 Latham, Tecu and Bagaria (n 19) 31.

79 Madl (n 17) 15.

80 Nicholas Levy, Henry Mostyn and Bianca Buzatu, 'Reforming EU Merger Control to Capture "Killer Acquisitions" – the Case for Caution' (2020) 19 Competition Law Journal 51, 57.

81 ibid 58.

2. Transaction-based Control

Since the threshold-based notification system may fail to entrust authorities making effective antitrust scrutiny for invisible concentrations, certain Member States, especially Austria and Germany taking the lead, introduced transaction-based control similar to the US antitrust practice in this regard. The problem with only cutting down thresholds for notifications at the EU level would not serve to bring a wide range of merger control but would slow down the review procedure by increasing the workload for the Commission to review filings and eventually lead to ineffectiveness in the functioning of the market economy. On various occasions, the European Commission has called for reform of the EUMR to introduce a mechanism akin to transaction-based merger review, yet, the Commission's view in this regard remains skeptical whether it would be a proper solution.[82] Accordingly, the concern for a transaction-based control system implies legal uncertainty for the calculation and measuring of divergent methodologies for transaction values used by companies.[83] Again, considering the potential burden for merger filings in the case of a transaction-based notification system, it may enhance the workload for reviews as well. The Commission's view in this respect persists in verifying the effectiveness of such implementation before adding to its toolbox[84] and waiting for outcomes coming out of German and Austrian practice first.

A transaction value threshold does not replace fundamentally the competitive assessment or a solid theory of harm, but it might ensure that the focus of merger control is shifted to takeovers of low-turnover unicorn firms in their infancy[85]. Yet, German practice has shown to date that no anticompetitive transactions could be identified that would otherwise (say absent the so-called transaction value test) escape antitrust scrutiny[86] and the Bundeskartellamt has so far not come across a critical case notified based on the transaction value threshold.[87] Similarly, we are unable to observe more effective control in the Member States implying a "market shares" element to impose mandatory notification for those exceeding certain market share thresholds, as the case in Portugal, Spain, and the UK.

Our personal view to have a transaction-based (or value-based) notification system appears not as an alternative but as a supportive apparatus that the European Commission might consider bringing in and using against "escaped" mergers and acquisitions to police these transactions that may potentially fall under the "killer

82 Frederick Brouwer, 'EU merger control: Dutch clause to catch future killer acquisitions' (Stibbe, 01.10.2020) accessed 01.03.2021

83 de Lamo (n 70).

84 Montjoye, Schwitzer and Crémer (n 1).

85 OECD (n 49) 58.

86 Levy, Mostyn and Buzatu (n 80) 56.

87 OECD (n 49).

zone". First, the replacement of the thresholds system by an eventual "transaction value-based" system implies certain ambiguities concerning the valuation of the transaction due to the difficulty of setting precise valuation caused by the volatility of exchange rates and stock prices.[88] Secondly, contrary to the existing regime of notification transaction, value-based control has the deficiency of providing a relevant legal nexus for the undertakings involved in the merger, meaning that it lacks evident qualifications for the relevant geographical market where the merger will potentially cause any concerns.[89]

Although we are unable to obtain full information on the global M&A transaction values of big tech incumbents, it was provided that one-third of the acquisitions of GAFA (excluding the "M": Microsoft) in pertinent markets fall under the $50 million transaction value.[90] On the contrary, it shows on the other hand that quite a significant number of acquisitions made by big tech players hit pretty high values and may still fall below the antitrust radar due to the turnover-based control system without any pertinency or connection to the transaction value of the acquisition. Therefore, we deem it proper to suggest a transaction-based control could be added to the toolbox as a supplementary apparatus as an efficient and predictable procedure in compliance with legal certainty for operators as well. For the time being, EU competition experts and the Commission's policy have started considering them yet are waiting first to see initial examples of implications introduced by Germany and some other Member States with regards to transaction-based jurisdictional criterion.

3. Ex-post Control

Unlike other procedures for controls under competition law in general (say prohibition of cartels or abuse of dominance), the merger control system relies on *ex-ante* control on undertakings willing to merge, meaning that parties are obliged to notify beforehand their transaction to the European Commission if the necessary thresholds and criteria are met. In some jurisdictions, the US foremost, the authorities are entitled to review mergers after the closing with or without any limitation of time depending again on the jurisdiction concerned. The logic and feature of *ex-ante* control provide legal certainty for both authorities and mostly for undertakings in the market while the *ex-post* control allows a "rethinking" of specific transactions with more accurate information available over time, yet it implies a significant cost for the market players that could suffer through a reversal decision by *ex-post* merger control.[91] The pros and cons of *ex-post* control have been debated for a long time and indeed made

88 Šmejkal (n 48) 6.

89 ibid.

90 Latham, Tecu and Bagaria (n 19).

91 Marco Ottaviani and Abraham L Wickelgren, 'Ex Ante or Ex Post Competition Policy? A Progress Report' (2011) 29(3) International Journal of Industrial Organization 356.

the subject of several studies. The question arises also within the extent of the *ex-post* review, whether to subject such control mechanisms to any time limitation. While the US is the only jurisdiction without any statutory time limit, countries with *ex-post* merger control impose specific time limitations for the intervention, for instance, four months in the UK, and one year in Canada, Mexico, and Brazil.[92] To catch acquisitions restricting the competition post-term, French practice reviewed to bring in and amend its current "*concurrence*" law further to proposals made by certain advisory bodies as to alternative lowered turnover thresholds or transaction-based notification systems.[93]

Ultimately, *ex-post* control still seems less favorable to use even at a national level due to the discouragement effect for the private sector to carry out major operations for fear of possibility by relevant authorities to wind up their mergers after closing, even should the *ex-post* review allow controlling by authorities (and thus cause uncertainty) for a limited period.

4. Referrals Made by Member States

Another mechanism that should be noted here is the referral method through national authorities of Member States to the European Commission, a procedure used in several critical examples such as the acquisition of Shazam by Apple or the merger of Facebook/WhatsApp. The former relates to the referral procedure under art.22(1) -originally called the *Dutch clause*- concerning the national authorities' discretionary power to refer the filing to the EU in case of affectation of trade between the Member States that might eventually restrict the competition at the EU level. The latter, on the other hand, relates to the merging parties' request for referral with the support of relevant national authorities in case of mergers notifiable at least in three Member States, say using the procedure set forth under art.4(5) of the EUMR. While several mergers in the tech market ultimately were revied by the Commission pursuant to EUMR referral mechanisms, discussion led the community to rethink the referral mechanism with potential amendment to improve possibility by empowering the Commission to review mergers even though they do not reach the national turnover thresholds either.[94] However, the ambiguity with the enforced referral mechanism amended in EUMR seems to be complicated and needs some verifications.

Under the current structure of referrals, say art.4(5) and art.22(1) of the EUMR, the scope of the review does not appear symmetric to normal merger filings at the EU level. Put simply, in case of referrals for a merger made by the Member States which might affect intra-trade, the EU Commission will be entitled to review the filing

92 OECD (n 49).

93 Ashurst, 'Competition policy in the digital era: a comparative guide' (2019) <https://www.ashurst.com/en/news-and-insights/legal-updates/comparative-guide-to-digital-competition-policy/> accessed 05.01.2021.

94 Kris Van Hove (n 2).

(although still under the scope of the EU competition rules but) limited to the territorial scope of those Member States. As for the referral made by the undertaking involved in mergers pursuant to art.4(5), the Commission acquires full jurisdiction to review, but in this case "transactions need to be notified to the Commission by the concerned parties, and this may not be in their own interest".[95] Due to this asymmetry, certain concentrations were not dealt with by the Commission, such as Facebook/Instagram or Google/Waze, but only reached the national authorities at the national level (this is the case for the UK Office of Fair Trading at the time).[96]

With the view of amplifying the scope and grounds for referrals, a new merger review policy intended to modify its approach on referrals has been put on the agenda of the European Commission. During her speech at the International Bar Association's 24th Annual Competition Conference held 11 September 2020, the Commissioner and the EU Vice-President Margrethe Vestager shared a new action plan[97] aimed to simplify merger filings and referrals under art.22 of the EUMR to eventually capture potential killer acquisitions. More recently, however, a new guidance on the application of the referral mechanism set out in art.22 has been published by the European Commission, showing an intention from the supervising body to slightly change its "referral based review policy".[98] Hence, in view to strengthen merger reviews especially for those involving innovative companies, the Commission has made it clear that its approach to the referral mechanism through the use of art.22 shall be eased to capture transactions escaping the merger control due to the lack of meeting necessary thresholds while having a significant impact on the competition in the internal market.[99] It should be noted, even after the change of approach to referrals, that two legal requirements must be met in order for the Commission to review the transaction: affectation of trade between the Member States; and threat to significantly affect competition within the territory of the Member State or States making the request.

Further to the guidance made public by the European Commission, a new debate has arisen in a current referral on acquisition of biotech company Grail by Illumina by the French Competition Authority to the Commission.[100] The transaction, initially being reviewed by the French authority, had been referred -perhaps- further to declarations made by the FTC, that the latter intends to block the merger having potential risk to

95 de Lamo (n 70).

96 ibid.

97 European Commission, 'The future of EU merger control' (2020) <https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en> accessed 29.04.2021.

98 European Commission, Communication on 'Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases' C(2021) 1959 [2021] <https://ec.europa.eu/competition/consultations/2021_merger_control/guidance_article_22_referrals.pdf>

99 ibid.

100 Jérémie Marthan and others, 'Latest developments on the Article 22 EUMR referral mechanism: the only thing that's certain is the uncertainty' (White & Case, 30 April 2021) accessed 14.05.2021.

innovation[101], which has been followed by the European Commission urging national authorities not to *hesitate* using "art.22 referrals". While the case referred to the Commission is supported by Dutch and Belgian authorities, the acquiring company is now challenging the "decision to refer" given by the French CA[102] on the grounds mainly that there has been an error of law to refer a dispute where there is lack of proof showing "obvious" concern in the transaction at hand that would seem likely to lead to anticompetitive effects and therefore goes against the legal certainty for economic operators requesting clarifications on mergers.[103]

It brings to question whether broadening the scope or to be more exact the way the Commission approaches the referral mechanism seems final or whether a definite solution can be achieved. We believe that there is still room for improvement and appreciate the effort and new proposals made by the European Commission to Parliament through the Digital Services Act Package, providing one of its two legislative proposals called "Digital Markets Act". Let us defer that till later.

IV. Reconsidering the EU Competition Rules

A. Amendment to EUMR: Time to Rethink Modifications

1. Killer Acquisitions Killing Competition: Start-Ups or Shutdowns?

Sitting back and watching or accepting that this is "the way tech rolls" is not seen as a proper way to approach the issue; big fish must not always be left free to eat the little where the general welfare of the society is affected, likewise the market competition itself. It should be clear now that despite the complementary advantages and facilities being provided after the innovative targets are acquired, not all acquisitions would necessarily result in efficiencies outweighing the anticompetitive effects. Sometimes the cannibalization or R&D projects left aside post-merger become a priority of competition law to ensure the competition for the market, not even competition within the market considering the market power of the existing incumbents.

Numbers seem critical. As previously referred to, Cunningham and others, in their study, first suggested the use of term "killer acquisitions". Their study found that around 3.7% of acquisitions in the pharmaceutical sector were incumbent firms with overlapping drug projects with the targeted firm, and were less likely to pursue a development post-acquisition, than the non-overlapping projects.[104] In their study, it is

101 Kyriakos Fountoukakos and others 'Commission publishes guidance on Article 22 referrals for transactions falling below national thresholds – New approach can impact pharma, tech and other deals involving start-ups or innovators' (Herbert Smith Freehills, 1 April 2021) accessed 14.05.2021

102 ibid.

103 Jérémie Marthan and others (n 100).

104 Cunningham, Ederer and Ma (n 7) 30.

assumed two types of acquisitions fall into this category: mainly where the incumbent firm intends purely to shut down the development of the acquired project or where it has the same product in development.[105]

Given the statistics of tremendous growth of GAFAM itself, a total of more than $71 billion investment in R&D was made only in 2017.[106] Google and Facebook together have “succeeded” more than 350 mergers till 2019,[107] while none of them were blocked by Agencies in the US. What could be missing, however, is the type and transaction amount that may run against the competition gameplay but fall outside the scope due to the lack of an effective toolbox. When examining all 55 acquisitions made by GAFAM in 2017, one can easily see that most of these acquisitions seem to be conducted over innovative and younger start-ups.[108]

In our view, the priority in competition policy should be accorded to preserve the efforts of smaller entrepreneurs which will not be distorted or removed from the market through buyouts for the sake of strengthening the market position by big incumbents. Not only consumers would likely prefer more competition in products/services and the variety of products/services offered, but also increased competition would allow more innovation to take place to reach consumers. In assessing the case for change and reforming the existing EUMR rules, the European Commission indeed appears to be waiting prudently for more empirical evidence before taking concrete actions.[109]

2. Other Potential Remedies: Upfront Prevention

Apart from the previously mentioned proposals to substantially modify the EU competition toolbox either to develop it with additional legal instruments or rethink the existing methods, we would like to give the floor to some -if not fully extreme- devastating proposals that need to be dealt with, with utmost care. As suggested by the Furman Report in the UK, it would also be possible to introduce a new regime exclusively targeted at digital incumbents with “strategic market status” allowing competition authorities to become aware of any planned mergers and acquisitions of these companies.[110] According to the report, companies holding market power over a strategic bottleneck market will be deemed to have “strategic market status”.[111]

105 ibid.

106 Gautier and Lamesch (n 17) 2.

107 Tim Wu and Stuart A. Thompson, ‘The Roots of Big Tech Run Disturbingly Deep’ (nytimes, 7 June 2019) <https://www.nytimes.com/interactive/2019/06/07/opinion/google-facebook-mergers-acquisitions-antitrust.html> accessed 25 November 2020.

108 Gautier and Lamesch (n 17) 2.

109 Levy, Mostyn and Buzatu (n 80) 55.

110 Furman and others (n 3).

111 de Lamo (n 70) 54; see also Bourreau and de Streel (n 64) 51.

At this point, we should also give brief details about current initiatives being taken by the Commission under the proposal for a legislative act referred to as the "**Digital Markets Act**", made public on 15 December 2020.[112] Being a part of a total legal package for the Digital Services Act, this so-called proposal aims to establish a fair and contestable market in the digital sector by imposing certain prohibited conducts and affirmative obligations (mainly in the form of refrainment), subsequently referred to "*do's*" and "*don'ts*". In this view, the Digital Market Act tends to define operators providing core platform services as "gatekeepers" that are associated with one of the services prescribed in art.2 on definitions, such as online intermediation services or online search engines. Furthermore, as a requirement to define a provider as a gatekeeper, one needs to satisfy three cumulative conditions (one having a significant impact on the internal market for instance) set out in art.3 pursuant to which the so-called platforms will be obliged to notify the European Commission and provide certain information thereto. What seems relevant to our study here is that among these obligations of do's and don'ts, the proposal imposes a duty for the gatekeeper entity to notify any intended mergers and acquisitions within the meaning of the EUMR on the condition that it involves another party provider of core platform services in the digital market. Art.12 hence stipulates that regardless of the fact that a specific merger or acquisition transaction meets the EU thresholds to notify or any other notification requirements under the national law of any Member State, gatekeepers shall notify the Commission of any such intended transaction. In this regard, based on *ex-ante* merger notification akin to the current regime under the EUMR, the Commission will be endowed with investigative powers to exercise certain control of gatekeeper platforms and whether they comply with requirements and their commitments. This obligation will, however, remain without prejudice to the closing of the transaction. Nevertheless, it will encourage entities to respect this new notification duty due to the high fines that could be imposed.

In response to such a major proposal, some scholars argue that the scope of "gatekeeper" platforms shall be limited to a few operators such as Google or Amazon but not to all tech giants, or those having significant market power in a specific field.[113] Moreover, it should be noted that not every business segment of gatekeepers holds significant market power in each relevant market that they operate. For instance, it is suggested alternatively to share subsequent elements aligned with the strategic market status definition, e.g., IP rights, network effects and user base, barriers to market entrance and market shares.[114] Instead of bringing a likely system of strict supervision on large incumbents, subordinating every transaction under the control

112 European Commission, 2020/0374 (COD) of 15 December 2020 on Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0842&from=en>.

113 de Lamo (n 70) 54.

114 ibid.

of competition authorities, one could consider a simplified notification procedure allowing authorities to review the transactions without requiring judicial thresholds or transaction value assessment. Accordingly, the merger review will only be proceeded through the opening of a review file within a limited period of time otherwise the transaction shall tacitly be granted approval.[115] Also referred to as premerger review, such a type of remedy, although providing power for authorities to challenge mergers without the necessity to meet thresholds, will likely increase the costs of monitoring the market which is burdensome.[116] Not to mention that antitrust concerns may not be ever so apparent until the acquisition goes through.[117]

Assessment of theories of harm, and restriction of competition are certainly not a simple course of action. In markets like digital platforms that tend to be dynamic in development with high network effects and requiring innovation at utmost ways of development where small operators face high entry barriers, the assessment by competition authorities demand an analysis encompassing the evolution of the market itself.[118]

B. Dilemma on Ensuring Fair Competition vs Encouraging Incentives to Innovate: Maintenance of Procompetitive Play of The Market & Avoiding the Risk of Overcontrol

There is no doubt that the market requires essential rules to supervise and monitor what is going on, stipulate norms and eventually prohibit certain behaviors or acts, a concept akin to those for contract law, i.e., tort law. As competition lawyers, we may, however, fall into the wrong track without considering the risk of overcontrolling the market, say killing incentives to innovate and invest. Until now we have tried to show how concentrated market structure in the digital sector complicates the entry of new innovative competitors and can barely allow the product range offered to consumers. On the other hand, it was alleged that such a high degree of intervention to the private sector can potentially undermine the incentives to innovate and invest. Competition law must take into account incentive effects and efforts that large players would invest in. This view is further justified when we think about driving prospective for some start-ups to build up an innovative product for the ultimate objective to be acquired by any large incumbents in exchange for great prices[119], thus an important exit strategy.[120]

115 ibid.

116 Bryan and Hovenkamp (n 21) 354.

117 ibid.

118 Argentesi and others (n 9) 2.

119 Levy, Mostyn and Buzatu (n 80) 63.

120 Furman and others (n 3) 101.

Nevertheless, start-ups being vulnerable to tech giants, cost effects of an incorrectly cleared merger will likely be higher in the digital sector than in traditional markets, which the latter justifies the reason why a more interventionist approach should be taken on digital market players.[121] Overall, one cannot deny the increasing concerns potential threat killer acquisitions would cause, a concern shared by various experts, lawyers and economists. One way or another, competition law tools must be tailored to the needs of the digital age by making use of improvements in methodological approaches or enlarging the toolbox for better scrutiny.

V. Conclusion

In this study, we tried to reveal how killer acquisitions in the digital market, particularly as far as the big tech market is concerned, may cut off the number of innovative but smaller businesses and consequently the variety of products offered to the public. By the acquisition of such promising initiatives, it further extends to pre-emption of future competitive constraints for large incumbents. Dynamics in the market are unpredictable, even for the best experts, and it may always remain as such. In any case there will be a certain degree of uncertainty for competition authorities in their assessment of mergers and acquisitions. That, however, shall not be an excuse for competition authorities to refrain from examining concentrations further in detail. The current regime at the EU level barely provides effective solutions to capture anticompetitive mergers and acquisitions escaping control mechanisms. There is clearly a need for a unique regime addressing large incumbents in the tech market, i.e., the GAFAM five, so that competition authorities and the European Commission at the EU level may scrutinize their activities while ensuring legal certainty at the same time. New proposals such as the Digital Markets Acts, thereby creating a set of unique rules applicable to tech giants, seem to make good progress. Even so, more can be done.

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