Stanford – Vienna
Transatlantic Technology Law Forum

A joint initiative of
Stanford Law School and the University of Vienna School of Law

European Union Law Working Papers

No. 84

Killer Acquisitions Under EU Merger Control: Recent European Commission Decisions

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2024

European Union Law Working Papers

Editors: Siegfried Fina and Roland Vogl

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Suggested Citation

This European Union Law Working Paper should be cited as:
Hatice Kocaefe, Killer Acquisitions Under EU Merger Control: Recent European Commission Decisions, Stanford-Vienna European Union Law Working Paper No. 84, http://ttlf.stanford.edu.

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Abstract

Merger control is a regulatory process that supervises corporate mergers and acquisitions ('M&A'), with the aim of safeguarding competition and the well-being of consumers in particular markets. However, a regulatory gap has emerged as large companies exploit loopholes to evade merger control thresholds. This strategy involves acquiring small companies with significant potential and market impact, eliminating potential competitors, and stifling promising innovation—commonly known as 'killer acquisitions'. This phenomenon poses significant concerns for jurisdictions as competitors are absorbed or marginalized through certain M&A transactions. The creation or consolidation of dominant positions can lead to reduced consumer benefits in terms of pricing, choice, quality, and innovation, resulting in less efficient and consumer-attractive markets. Merger control seeks to prevent these companies from becoming too powerful and negatively impacting competition, thereby significantly affecting both existing and potential competitors. Recognizing this regulatory gap, the European Commission ('EC') has taken action to address it, utilizing Article 22 of the EU Merger Regulation ('EUMR') and releasing new guidance on its interpretation. Furthermore, the focus has extended to the digital market, given its significance in contemporary commerce. This study delves into the recent decisions made by the EU Commission in the pharmaceutical and digital sectors, which talks about the origins of killer acquisitions, the evolving perspective of the EC, and the practical implementations of its regulatory measures. Additionally, the research continues investigating the contemporary challenges and concerns associated with killer acquisitions in practice and explores competitive effects, highlights emerging issues, and offers insights into potential solutions. To arrive at comprehensive findings, the study employs qualitative research methods, analyzing relevant regulatory frameworks, academic literature, significant cases, and M&A statistics and contributes to a better understanding of killer acquisitions, their impact on competition, and the evolving role of merger control in addressing this complex issue.

ACKNOWLEDGEMENTS

I wish to begin by expressing my heartfelt gratitude to my family, whose support I sense with every step I take. Particularly, I want to extend my deepest thanks to my mother, Nur Kocaefe, and my sister, Elif Kocaefe, for being not only my greatest supporters but also my endless sources of inspiration in life.

I am immensely grateful to my friends who have stood by my side and provided their assistance in countless ways throughout the year*;* Begum Ayvaz, Elifcan Sahan, and Irem Alpargun, as well as Kaan Tıg and Damla Seymen, whose encouragement has been invaluable.

I would also like to extend a special thank you to Hannah Krakoling, Ebru Nihan Bulbul, and all the remarkable individuals I had the privilege of meeting during this program, each of whom holds a special place in my heart.

Lastly, my sincere appreciation and thanks go to my supervisor, Marco Botta, whose understanding, and guidance have been instrumental in my study. His work has not only guided but also inspired this project, and for that, I am truly grateful.

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LIST OF ABBREVIATIONS

API	Application Programming Interface
CAT	Competition Appeal Tribunal
CMA	Competition and Markets Authority
CRM	Customer Relationship Management
DMA	Digital Markets Act
EC	European Commission
EEA	European Economic Area
EU	European Union
EUMR	European Union Merger Regulation
FTC	Federal Trade Commission
GAFAM	Google, Apple, Facebook, Amazon, and Microsoft
HMG	Horizontal Merger Guidelines
IP	Intellectual Property
IPO	Initial Public Offering
M&A	Mergers & Acquisitions
NCA	National Competition Authority
NGS	Next-Generation Sequencing
NHMG	Non-Horizontal Merger Guidelines
OEM	Original Equipment Manufacturers
R&D	Research and Development
SMB	Small to Medium-sized Business
SSNIP	Small but Significant Non-Transitory Increase in Price

1. Introduction

In today's dynamic and evolving business landscape, companies increasingly turn to corporate mergers and acquisitions as a prevalent strategy to achieve growth, establish market dominance, and drive innovation. While M&A activities can yield numerous benefits, they have also raised significant concerns about their potential to stifle competition, limit consumer choice, and hinder innovation. A specific subset of M&A transactions, known as 'killer acquisitions' has emerged as a focal point of these concerns, triggering regulatory responses aimed at safeguarding competitive markets and consumer welfare.

Large companies have strategically exploited regulatory gaps to engage in killer acquisitions that evade traditional merger control thresholds. These acquisitions typically target small companies with significant potential, aiming to eliminate potential competitors and suppress promising innovations. Given the limitations of existing regulatory frameworks, there was a pressing need to comprehensively examine the phenomenon of killer acquisitions, their impact on competition, and the regulatory measures devised to address them.

The objectives of this thesis are to define and conceptualize killer acquisitions, examine the theoretical underpinnings of harm caused by such acquisitions, analyze real-world instances in the pharmaceutical and digital markets, evaluate the regulatory landscape within the EU, assess the competitive effects of killer acquisitions, understand the motives behind large companies' engagement in such practices, scrutinize the challenges and regulatory concerns in detail, examine positive aspects and diverse perspectives, and ultimately provide recommendations for a balanced regulatory approach that fosters fair competition and innovation while addressing the issues posed by killer acquisitions.

Chapter 2 provides a foundational understanding of merger control within the European Union ('**EU**'). It defines key concepts such as mergers and control and emphasizes the importance

of merger control in safeguarding competition and consumer interests. The chapter outlines the EU's merger control process, covering stages from pre-notification to post-merger monitoring, with a focus on aspects like market definition, competitive assessment, theories of harm, remedies, appeals, and the role of the EU courts.

Chapter 3 delves into killer acquisitions, defining them and exploring associated theories of harm. It analyzes real-world examples in the pharmaceutical and digital sectors, including cases like Illumina/Grail and Meta/Kustomer, within the EU's regulatory framework.

Chapter 4 examines the competitive effects of killer acquisitions, with a focus on market dynamics, pricing, consumer choice, and innovation. It addresses challenges, regulatory concerns, diverse perspectives, and concludes with recommendations to balance competition and innovation in today's business landscape.

2. Merger Control: Understanding the EU Framework

2.1. Merger Control

Merger control is a regulatory process and plays an indispensable role in safeguarding fair competition and consumers in specific markets. Its primary objective is to prevent situations where corporate combinations, if not properly managed, could lead to higher prices, restricted consumer choices, and reduced innovation due to increased market concentration. This process considers various forms of concentration and underscores the critical role of control in shaping competition dynamics within specific markets.

2.1.1. Definition of a Merger

Under the purview of competition law, a merger encompasses two fundamental scenarios. Firstly, it entails the legal fusion of previously independent companies under corporate law. Secondly, it involves the acquisition of control over one or more companies, known as 'targets',

achieved through various means such as purchasing securities, acquiring assets, contractual arrangements, or alternative methods.[1]

Moreover, in certain situations, the formation of joint ventures that exhibit the characteristics of independent economic entities or represent collaborative efforts among competing entities can also be considered mergers under certain legal contexts. It's worth noting that these contractual collaborations, when reaching the level of joint ventures, may necessitate mandatory notification in specific jurisdictions.[2]

2.1.2. Control

Control is a critical element in merger control because changes in control resulting from transactions like mergers and acquisitions can significantly impact competition within a market. It extends beyond ownership percentages and encompasses the authority and influence to shape a company's strategic decisions, operations, and policies. This influence includes critical aspects like investments, product offerings, key personnel appointments, budget allocation, and other pivotal elements that steer a company's trajectory.

2.2. Merger Control in the EU

In the European Union, the concept of merger control constitutes a comprehensive framework designed to oversee transactions involving entities that wield dominance within the market. This regulatory mechanism mandates competition authorities to scrutinize and regulate deals featuring companies holding a dominant position in their respective markets. Companies are obligated to proactively inform regulators about such deals. If a transaction meets the criteria outlined in the merger control rules of a specific country or the broader EU regulations, it is crucial

[1] Bjorn Lundqvist, 'Killer Acquisitions and Other Forms of Anticompetitive Collaborations (Part II): A Proposal for a New Notification System' (2021) 5 Eur Competition & Reg L Rev 344, 347.
[2] Ibid 347.

to notify the relevant authorities.[3] It's noteworthy that the scope of merger control extends beyond conventional mergers. This regulatory process encompasses a spectrum of transactions aimed at combining businesses or consolidating control. Therefore, companies engaged in such transactions must comply with the regulatory requirements set forth by the relevant authorities.

European merger control operates under the regulatory purview of the EU Merger Regulation[4] designed to safeguard against anti-competitive ramifications arising from mergers and acquisitions within the expansive scope of the EU's single market. This regulatory framework is primarily overseen by the EU's competition authorities, led by the European Commission, responsible for the enforcement and administration of these measures.

The EU Merger Regulation[5] specifically defines the essence of 'merger control' in Article 2/3. It stipulates that a 'concentration'—a term encompassing transactions involving changes in control—shall be considered incompatible with the common market if it significantly impedes effective competition within the common market or a substantial part thereof.[6] The hindrance to competition can particularly emerge when there is the formation or reinforcement of a dominant market position.[7]

2.3. The Merger Control Stages in the EU

2.3.1. Pre-Notification Stage

Before a merger or acquisition is formally submitted to the European Commission for review, the parties involved can engage in a pre-notification dialogue. This is a voluntary process,

[3] Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJL24/1 (EUMR).
[4] Ibid.
[5] Ibid.
[6] Ibid art 2.
[7] Finnish Competition and Consumer Authority, FCCA approves acquisition of Staff Point Holding by Sponsor Fund IV (KKV, 25.10.2017) <https://www.kkv.fi/en/current/press-releases/fcca-approves-acquisition-ofstaffpoint-holding-by-sponsor-fund-iv/> accessed 11 September 2023.

but it is highly recommended. This stage is crucial because it allows the parties to understand whether their transaction falls within the scope of EU merger control regulations. Discussions during the pre-notification stage are typically confidential, which means that the information provided by the merging companies is not disclosed to the public or competitors. During this phase, companies and their legal advisors evaluate several factors to gauge if the proposed merger meets the criteria that trigger EU merger control. These thresholds primarily focus on financial aspects and include:

(i) EU Turnover Thresholds

The European Merger Regulation[8] determines when a merger falls within the scope of notification and possesses a 'Union dimension' relies on assessing the companies' revenues. Companies assess whether their combined turnover within the European Union meets the prescribed thresholds. If the turnover exceeds these thresholds, the merger falls under EU jurisdiction.

The EUMR's Article 1 outlines the jurisdictional thresholds as follows: (i) The combined worldwide revenue should exceed 5 billion Euros, (ii) Each of the involved companies must generate at least 250 million Euros within the European Union, (iii) Not only the directly participating companies, but also their affiliated company groups, need consideration.[9]

In essence, the EUMR's provisions offer guidance on when mergers require notification, outlining these criteria based on financial thresholds to ensure that mergers with significant economic impact are subject to appropriate review.

[8] Council Regulation (EC) 139/2004 (n 3).
[9] Ibid art 1.

(ii) Activities in Multiple EU Countries

If the merging companies operate and generate turnover in various EU member states, they evaluate whether their activities in each country are significant enough to contribute to the overall EU turnover.

(iii) Market Shares

Although not the primary determinant of jurisdiction, market shares can provide additional context. Companies might consider the potential market impact of the merger concerning market concentration.

(iv) Complexity

Mergers involving complex issues, activity overlaps, or potential competition concerns are more likely to require review by the European Commission.

The primary goal of this pre-notification jurisdictional assessment is to ensure that companies are fully aware of their obligations under EU merger control. If it's established that the merger meets the thresholds and falls under EU jurisdiction, the merging parties can proceed with the formal notification process. If not, they might avoid the potentially time-consuming and resource-intensive review by the European Commission.

2.3.2. Notification

After meeting specific revenue thresholds, if the parties choose to proceed with the merger following the pre-notification stage, they are required to formally notify the European Commission. This notification encompasses comprehensive details about the companies, the transaction's nature, the affected markets, and potential anti-competitive effects. Subsequently, the European Commission conducts an initial assessment of the notification to ascertain if the transaction raises potential competition concerns.

2.3.3. Initial Assessment of the European Commission

Upon receiving the formal notification, the European Commission begins its initial assessment. This assessment involves examining whether the proposed merger raises concerns regarding competition within the EU market. The European Commission looks at factors such as relevant markets, market shares, market concentration, and potential anti-competitive effects.

(i) Market Definition

The European Commission defines relevant product and geographic markets to assess competition. This involves understanding the nature of the products/services and the geographical scope in which they are offered.

The core objective of market definition is to view the market from the perspective of consumers, typically encompassing end-users or intermediary entities such as retailers. The determination of the relevant market is central to this endeavor. To accomplish this, the 'Small but Significant Non-transitory Increase in Price' ('**SSNIP**') test[10] is widely employed. This method constitutes an established approach to discerning the contours of the market.

The SSNIP test is a hypothetical exercise wherein a small, yet enduring, price increase (typically in the range of 5% to 10%) is envisaged for the product in question. The response of consumers to this hypothetical price alteration serves as a benchmark for gauging market boundaries. Two concentric circles of analysis emerge from this approach. The first pertains to the reaction of consumers in the face of the hypothetical price increase. If consumers would likely to switch to alternative products or services, those substitutes would become part of the market. The second circle pertains to whether consumers would resort to other offerings if the original product

[10] Erdem AKTEKIN, 'Relevant Product Market Definition In TwoSided Markets Under EU Competition Law' (2017) 18(1) Competition Law Journal, 84.

were to become prohibitively expensive. If a viable alternative emerges, it too is incorporated within the market. Conversely, if a significant portion of consumers indicate a lack of propensity to switch, the market scope is refined. This refinement process is typically conducted through hypothetical market tests, where consumers are probed for their potential behaviors in response to market changes. Although challenging due to the extensive engagement required, this methodology proves more feasible in less consumer-dense markets and industries, such as industrial markets.

In essence, market definition in EU merger control is a methodical process that employs the SSNIP test to establish the boundaries of the market by examining consumer behavior in response to hypothetical changes in price. The objective is to precisely delineate the relevant market within which competitive dynamics are assessed for merger control purposes.

(ii) Competitive Assessment

The competitive assessment of the EU merger control involves a comprehensive evaluation of market share, dominance potential, and potential coordinated and non-coordinated effects. This analysis is aimed at ensuring that the proposed merger does not lead to adverse consequences for market competition, consumer welfare, and innovation. If concerns about competition arise from this assessment, the European Commission may impose remedies or even prohibit the merger to safeguard healthy competitive dynamics within the market.

- **Market Share and Dominance**

The European Commission evaluates the consolidated market share of the merging entities within the relevant market.[11] To ascertain dominance and market power, it evaluates

[11] Damien J Neven and Lars-Hendrik Röller, 'The Allocation of Jurisdiction in International Antitrust' (2000) 44(4-6) EER 845-855 <https://doi.org/10.1016/s0014-2921(00)00048-9> accessed 12 September 2023.

whether the merging entity can act independently of competitors, customers, and suppliers, thus exerting significant influence over market dynamics. This assessment considers various factors, including the identity of the customer base. A crucial consideration is whether the dominant company must be concerned that certain behaviors might lead to customer attrition. This aspect, known as 'switching', highlights the power customers hold based on their characteristics. If a customer is influential, makes significant purchases, the threat of switching suppliers can impact the company's decisions. Another indicator of dominance is the significance of a product to customers. If a product is deemed a 'must-have item', it becomes pivotal in competition law and suggests a company's dominant position. Additionally, understanding what the market depends on is essential for evaluating market dynamics and dominance implications.

- **Coordinated and Non-Coordinated Effects**

The competitive assessment encompasses an analysis of two distinct types of effects that a merger might have on competition. The European Commission examines whether the merger could result in coordinated effects, involving collusion among a small number of firms, or non-coordinated effects such as higher prices, reduced quality, or inhibited innovation that would ultimately harm competition.

Coordinated effects refer to a situation where a merger facilitates collaboration among a small number of firms in the market. This phenomenon occurs particularly in markets with a few players of similar size. In a transparent and concentrated market, coordination becomes easier due to reduced risk in adopting similar strategies. This collusion leads to less competition as the coordinated actions among competitors diminish the diversity of choices available to consumers.

Non-coordinated effects arise when a merged entity can independently shape the market landscape. In this scenario, no explicit collusion is required; the merged entity holds enough market power to act unilaterally. This often results in reduced competition, potentially leading to higher

prices, lower product quality, and reduced innovation.

(iii) Theories of Harm in the EU Merger Control

In the realm of EU merger control, theories of harm serve as essential analytical frameworks to discern potential anticompetitive ramifications arising from mergers and acquisitions. These theories are instrumental in safeguarding effective competition within the European Single Market. Here, we outline several key theories of harm that underpin the evaluation process in EU merger control:

Horizontal effects involve the union of firms operating at the same market level within the supply chain. The concern rests on the possibility of decreased competition, leading to elevated prices and limited consumer choice due to the removal of a competitor.

Vertical effects entail the amalgamation of entities functioning at distinct supply chain tiers, such as suppliers and customers. Potential concerns encompass foreclosure or anticompetitive access to inputs or markets, potentially bestowing unfair advantages, or curbing competition in upstream or downstream sectors.

Conglomerate effects unite firms operating across unrelated markets. These mergers warrant scrutiny if the merged entity gains undue market power, capable of influencing competition in markets disparate from its core activities.

Coordination effects theory scrutinizes how mergers might facilitate coordination among firms. If a merger enables collusion or coordinated conduct, it could lead to anticompetitive outcomes and reduced consumer welfare.

Unilateral effects emerge when a merger's aftermath includes reduced competition due to the merged firm's potential to independently raise prices or limit output. This theory becomes pertinent in markets with few players, where heightened market power following the merger might translate to elevated prices.

Potential competition theory underscores the consequences of obliterating a future competitive threat presented by a merging entity. If merging parties are close competitors or potential competitors, the merger could eliminate future competition, affecting consumer welfare.

Innovation effects theory gauges how mergers might impact innovation dynamics. Mergers could diminish innovation incentives or eliminate competition that propels innovation, ultimately resulting in reduced technological progress and consumer choice.

These theories of harm form the cornerstone of assessments conducted by the European Commission during the review of proposed mergers and acquisitions. By analyzing market structures, shares, competitive interactions, and potential anticompetitive implications, these theories guide determinations on whether a merger is permissible and, if so, under what stipulations. The theories considered in each case are contingent on the market's characteristics and the specifics of the merger under examination.

2.3.4. Decision

If the European Commission believes that the merger is unlikely to harm competition in the EU market, it can grant approval. If there are concerns, it may request additional information, negotiate remedies with the merging parties, or, in more serious cases, initiate a Phase II investigation.

(i) Remedies and Negotiations

Remedies in the context of EU merger control refer to measures or actions that merging parties propose and implement to address competition concerns arising from a proposed merger or acquisition. These remedies are designed to mitigate potential negative impacts on competition within relevant markets.

There are two main types of remedies in EU merger control:

- **Structural Remedies ('Divestitures')**

This type of remedy involves the divestiture or sale of certain assets, businesses, or operations to third parties. The aim is to reduce market concentration and prevent the establishment or strengthening of dominant positions that could harm competition.[12] For instance, if a merger between Company A and Company B would significantly reduce competition in a particular market, the authorities might require the divestiture of certain overlapping businesses to maintain competitive dynamics. We observe the real-life example of this in the Bayer/Monsanto case, which we will delve into in the following chapter.[13]

- **Behavioral Remedies**

Behavioral remedies focus on influencing the behavior of the merged entity to ensure that it continues to compete fairly and does not engage in anticompetitive practices. These remedies often include commitments from the merged entity to maintain certain pricing, quality, or innovation levels, provide access to key resources, or offer licensing arrangements to third parties. The goal is to preserve competition by curbing the potential abuse of market power. The Google/Fitbit case provides the initial illustration of this concept in the EU, which we will delve into its details in the following chapter.[14]

The process of proposing and implementing remedies involves negotiation between the competition authorities and the merging parties. The authorities assess the effectiveness of the proposed remedies in addressing the identified competition concerns. This assessment considers factors such as whether the remedies can maintain pre-merger competitive conditions, preventing price increases, and allowing new competitors to enter the market. These remedies are subject to

[12] European Community Competition Policy 1994, 'Summary of the Annual Report' (1995) <https://core.ac.uk/download/pdf/148866528.pdf.> accessed 13.09.2023.
[13] Case M.8084 *Bayer/Monsanto* [2018] OJ C459.
[14] Case M.9660 *Google/Fitbit v Commission Decision* 194/2021/EC [2021] OJ C194/6.

scrutiny to ensure that they are practical, enforceable, and can effectively restore competition in markets that may be adversely affected by the merger. The primary objective is here to achieve a delicate balance, permitting business mergers that foster efficiency and innovation while preserving competitive markets for the benefit of consumers.[15]

(ii) Phase II Investigation

The Commission may also choose to initiate a Phase II investigation if the initial assessment indicates a substantial potential for the merger to reduce competition in the EU market. This is a more comprehensive and detailed examination that can lead to the merger being approved with conditions or blocked altogether.

Based on its assessment, the European Commission may approve the transaction with or without conditions if it believes that the competition concerns have been adequately addressed. If the European Commission determines that the merger would significantly harm competition and that remedies are insufficient, it can prohibit the transaction. However, merging parties have the right to challenge the European Commission's decision in the EU courts if they believe the decision is unjustified or legally flawed.

2.3.5. Implementation and Post-Merger Monitoring

If the merger is approved, the merging parties can proceed with the transaction, subject to any conditions or remedies imposed by the European Commission. The European Commission may monitor the implementation of remedies to ensure compliance and effective competition.

[15] Summary of the Annual Report 1995 (n 12).

3. Killer Acquisitions

3.1. Definition of Killer Acquisitions

Unlike traditional merger control systems that subject acquisitions meeting specific turnover criteria, killer acquisitions often manage to evade scrutiny.[16] This regulatory loophole enables companies with lower revenues to strategically sidestep the merger control mechanism, effectively avoiding potential obstacles to their competitive dominance.

To illustrate, a company engaging in a killer acquisition may identify a smaller firm with innovative products on the horizon. By assimilating this smaller entity early on, the acquirer aims to not only capitalize on promising developments but also preemptively thwart future challenges from emerging competitors. This strategic maneuver allows for a more nuanced understanding of the complexities defining the phenomenon of killer acquisitions, emphasizing its implications for the dynamics of corporate competition.

Moreover, in the fast-paced landscapes of industries such as pharmaceuticals and technology, where innovation plays a pivotal role, killer acquisitions have emerged as a strategic practice deserving substantial attention. In the subsequent exploration of this strategic action, we will delve into specific examples and consequences, shedding light on the intricacies that underscore the significance of killer acquisitions in the corporate landscape.[17]

3.1.1. Background

The concept of 'killer acquisitions' was first introduced in a landmark research paper written by Colleen Cunningham, Florian Ederer, and Song Ma, with a particular emphasis on the

[16] Diederik Schrijvershof, Martijn van de Hel and Paul Breithaupt, 'European Commission Calls for Notification of Killer Acquisitions' (*Maverick Blogs,* 22 April 2021) <https://www.maverick- law.com/en/blogs/european-commission-calls-for-notification-of-killer-acquisitions.html> accessed 04.04.2022.
[17] Ibid.

pharmaceutical industry.[18] However, there remained a need to extend this understanding to other industries and develop frameworks that address the unique characteristics of different markets.[19]

This phenomenon ignited substantial discourse surrounding these acquisitions, especially within the technology sector, where tech companies anticipate a decline in its future profits once the promising competitor or its product matures. Therefore, the companies opt to engage in a merger with the potential competitor, aiming to preempt competitive challenges.[20]

Consequently, a demand emerged for a fresh analytical framework that could provide novel tools for scrutinizing these transactions, particularly those involving smaller firms with comparatively modest turnovers.[21]

3.1.2. Understanding the Motive of Large Companies

(i) Elimination of Future Competitors

Acquirers often begin by purchasing small companies with the intent of removing potential future rivals and their upcoming products. For example, leading Big Tech companies such as Amazon, Alphabet, and Samsung, along with prominent pharmaceutical firms like Roche, Johnson & Johnson, and Merck, invest significantly in innovation. These major players engage in a strategy where smaller, more agile companies can experiment with diverse concepts, proving their viability. Established companies then acquire these successful startups, facilitating the technology's growth and overcoming potential hurdles that smaller firms might encounter when operating independently.[22] This strategy helps mitigate risks associated with newly acquired products and

[18] Cunningham Colleen, Ederer Florian and Ma Song , 'Killer acquisitions' (2021) 129 (3) J.Pol.Econ. 649 <https://ssrn.com/abstract=3241707> 04.04.2022.
[19] Claire Turgot, 'Killer Acquisitions in Digital Markets: Evaluating the effectiveness of the EU Merger Control Regime' (2021) 5(2) European Competition and Regulatory Law Review 112, 112.
[20] Ibid 113.
[21] Ibid 112.
[22] Kelly Fayne and Kate Foreman, 'To Catch a Killer: Could Enhanced Premerger Screening for "Killer Acquisitions" Hurt Competition?' (2020) 34(2) ABA Antitrust Law Journal, 8,10.

aims to promote innovation through the acquisition of well-formed ideas.

(ii) Avoidance of Research & Development ('R&D') Investments

Instead of dedicating resources to R&D, the acquiring company seeks to acquire pre-existing, fully developed ideas.[23] For instance, considering innovative startups, often heavily research oriented. These smaller companies lack the resources needed to turn their groundbreaking discoveries into actual drugs and find themselves at a disadvantage due to agreements with pharmaceutical giants. These startups face obstacles in advancing their research because larger pharmaceutical firms impose limitations on them through R&D agreements.

While major companies may offer support for development, they often require joint development or exclusive control over the discovered molecules. This effectively gives them the power to veto any transformation of these molecules into actual drugs. Notably, these giants' motivations extend beyond new drugs; protecting existing revenue might lead to delaying innovative drug development, safeguarding established market shares.[24]

Hence, in the context of competition law, the significance of innovation is notable. The smaller, innovative companies that are acquired may no longer have the incentive or resources to continue developing new and disruptive technologies or products. This can slow down progress and limit the introduction of new and improved offerings in the market.

3.1.3. Theories of Harm

The term 'killer acquisitions' does not establish a distinct category of acquisitions; rather, it represents a concept rooted in theories of harm.

Harm to potential competition reflects concerns that acquiring potential competitors can

[23] Lundqvist (n 1), 186.
[24] Ibid 352-353.

curtail the emergence of vigorous competition in the market. The acquiring company's motives stem from the anticipation of diminished profitability when the target's innovative product reaches its full potential. To counter this future threat, the acquiring company might choose to stifle the target's innovation efforts or actively incorporate and develop these innovations, even if it entails potential risks to its own products and sales.[25] Consequently, this theory spotlights the looming possibility of reduced competitive dynamics within the market. The absence of new entrants and the scarcity of competition from innovative startups could lead to a diminishment in consumer choices and potential outcomes of escalated prices or lower-quality offerings.

Harm to innovation focuses on the potential stifling of innovative efforts when promising startups are acquired, and their innovations are either suppressed or integrated into the acquiring company's offerings. This strategic maneuver can be driven by a desire to safeguard the acquirer's existing products or to avert the smaller firm's innovation from maturing into a competitive threat. As a result, this theory posits that killer acquisitions can discourage startups and smaller enterprises from investing in research and development. This is fueled by the awareness that their innovations might be procured and subsequently sidelined by more established industry giants. The ripple effect of this phenomenon is the potential hindrance of technological advancement and overall innovation within the industry.

Distortion of Market Dynamics has the potential to disrupt the equilibrium of market competition. Often, smaller entities are absorbed before they have the chance to establish a firm foothold, consequently resulting in an uneven playing field where established incumbents wield a more substantial influence. This theory emphasizes the dangers of a less diverse and dynamic market environment. With fewer independent players, markets could experience a decline in

[25] OECD Secretariat, 'Start-ups, Killer Acquisitions and Merger Control- Background Note' (2020) Organization for Economic Co-operation and Development (OECD) DAF/COMP (2020) 6, 2.

overall competitiveness. This, in turn, could lead to diminished incentives for quality enhancements and cost reductions, ultimately impacting consumers.

In terms of *Barriers to Entry for New Competitors*, killer acquisitions can inadvertently erect formidable barriers for new entrants endeavoring to penetrate the market. The act of established incumbents acquiring potential competitors translates to heightened difficulties for new players attempting to gain traction and challenge the established dominance. The consequence of this scenario could be a long-term reduction in both competition and innovation. Heightened barriers to entry can discourage entrepreneurial ventures and limit consumer choices, ultimately yielding less advantageous outcomes for consumers.

Regarding *Regulatory Challenges*, the prevailing regulatory thresholds for mandatory notifications of acquisitions often hinge on financial metrics, such as turnover. In the context of killer acquisitions, smaller firms targeted for acquisition might fall below these thresholds, effectively bypassing comprehensive regulatory scrutiny. This theory underscores the imperative need for regulatory reforms to ensure that potential killer acquisitions are subjected to appropriate assessment, regardless of the modest turnovers of the target firms.

In conclusion, the theories of harm inherent to killer acquisitions underscore the potential negative ramifications for competition, innovation, and the well-being of consumers. These theories serve as a foundation for evaluating the repercussions of such acquisitions on the intricate dynamics of the market. Additionally, they prompt the development of regulatory measures aimed at mitigating the potential anticompetitive consequences associated with these strategic maneuvers.[26]

[26] Ibid 37.

3.2. Killer Acquisitions in the Pharma and Tech Market

3.2.1. Killer Acquisitions in the Pharmaceutical Sector

The pharmaceutical industry has complex regulatory environment, lengthy research and development processes, and significant investment required for drug development contribute to the nuanced dynamics of killer acquisitions within this sector. Therefore, analyzing the pharmaceutical market in the context of killer acquisitions offers valuable insights into the interplay between innovation, competition, and corporate strategies within a specialized and highly regulated industry.

As previously explained, the concept of 'killer acquisitions' originated in the pharmaceutical sector. Esteemed researchers such as Cunningham, Ederer, and Ma have conducted empirical studies that shed light on this phenomenon within the pharmaceutical industry.[27] Their scholarly investigations delve into the motivations behind pharmaceutical company acquisitions, raising questions about whether these actions are primarily driven by financial gains. This often results in the integration of innovative targets at the expense of curtailing their research efforts.

In this regard, a killer acquisition in the pharmaceutical context denotes a strategic corporate maneuver wherein a larger, established pharmaceutical entity acquires a smaller innovative counterpart, frequently aiming to thwart potential competition or curtail the disruptive innovation that the smaller firm might introduce.

Notably, studies undertaken in the pharmaceutical sector reveal a substantial proportion of acquisitions involving promising new drugs that ultimately result in the cessation of their developmental progress, as observed within the purview of the EU Commission.[28] As an

[27] Cunningham, Ederer and Ma (n 18).
[28] Commission, 'Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases' COM (2021) 1959 final OJ C113/01 (Guidance on article 22 EUMR), para 9.

illustrative exemplar of a 'killer acquisition' within the pharmaceutical sector, **the Bayer-Monsanto**[29] merger stands as a notable case.

Bayer/Monsanto

In the world of agriculture, a group of major players were known as the Big Six; Monsanto, Bayer, DuPont, Dow, Syngenta, and BASF. After the Dow & DuPont merger in 2015, the landscape transitioned to the Big Five.[30]

In September 2016, the German pharmaceutical and chemical company Bayer made a significant announcement regarding its intention to acquire Monsanto, a multinational corporation recognized for its expertise in the fields of agrochemicals and agricultural biotechnology.[31] Bayer's acquisition of Monsanto involved a sum of $66 billion[32] and it sparked concerns among certain stakeholders regarding the potential for excessive corporate concentration. The reason is that the merger between Bayer and Monsanto was poised to drive additional consolidation, culminating in the establishment of the Big Four.

In 2017, the European Commission initiated an investigation to evaluate the proposed acquisition under the regulations set forth by the EU Merger Regulation.[33] The Commission expressed concerns over the possibility that this merger could lead to the formation of a highly dominant company in the global seed and pesticide industry potentially resulting in reduced competition within these sectors.[34] The merger would bring together two competitors, each

[29] *Bayer/Monsanto* (n 13).
[30] Herica Huang, 'Antitrust: A Case Study on the Bayer-Monsanto Merger' (University of Essex 2020) 1.
[31] European Commission, 'Mergers: Commission clears Bayer's acquisition of Monsanto, subject to conditions' (2018)<https://ec.europa.eu/commission/presscorner/detail/en/IP_18_2282> accessed 10.05.2022.
[32] Ibid.
[33] Ibid.
[34] Carsten Guderian, 'Innovation in Merger Analysis – How the EU Commission Evaluated the Case of Bayer-Monsanto' (*LexisNexis*, 9 April 2019) <https://www.lexisnexisip.com/resources/innovation-in-mergeranalysis-how-the-eu-commission-evaluated-the-case-of-bayer-monsanto/> Accessed 08.08.2022.

possessing leading portfolios in non-selective herbicides, seeds and traits, and digital agriculture.[35]

Subsequently, Bayer and Monsanto put forth commitments aimed at addressing certain preliminary concerns raised by the Commission. However, the Commission found that these commitments were not sufficient to completely address its significant concerns about the transaction's compliance with the EU Merger Regulation and refrained from testing these commitments with market participants.[36]

Initially, this merger faced significant obstacles due to various specific regulations. However, eventually following a thorough investigation the European Commission granted conditional approval to proceed with the merger on 21 March 2018. The strict condition of divesting a comprehensive remedy package specifically addresses the areas of seeds, pesticides, and digital agriculture where the two companies have overlapping operations.[37]

The commitments of Bayer; they agreed to sell their competing seed treatment assets and products, and they also decided to sell their complete global digital agriculture assets and products, under the condition that the buyer of the digital agriculture assets would grant Bayer a temporary license to continue using them.[38]

The Commission agreed to these terms, acknowledging that despite operating in different product categories, there is potential for synergy and complementarity between their offerings. To address concerns about market concentration, Bayer committed to disposing of key subsidiaries that had overlapping operations with Monsanto, thus promoting a more balanced competitive market.[39] The EU's authorization was contingent upon adherence to regulations that guarantee the presence of effective competition and innovation in the markets of seeds, pesticides, and digital

[35] Guidance on article 22 EUMR (n 28).
[36] Ibid.
[37] *Bayer/Monsanto* (n 13) paras 136-139.
[38] Ibid paras 2-9.
[39] Huang (n 30) 3-4.

agriculture.[40] As per the Commission, this commitment would ensure that a suitable buyer is able to effectively replace Bayer's competitive influence in these markets and continue driving innovation.[41]

Consequently, the Commission holds the belief that the regulations pertaining to safeguarding competition and antitrust are insufficient to prevent this merger from taking place.[42]

Observations

Considering all these aspects, the commitments seemed aimed at shifting market power to another contender and the outcome was the opposite, leading to an even more consolidated market. The reason is that the Bayer's commitment to divest a portion of their business involved selling it to a third party, which happened to be BASF[43]. In my view, opting for a competitor beyond the Big Five could have been a plausible alternative, as using BASF as the buyer doesn't convincingly justify approving the merger.

Corroborating this viewpoint, experts across various fields share the view that the merger primarily advances the interests of the involved firms, enabling them to secure profits and consolidate market dominance through the gradual elimination of smaller competitors. Simultaneously, a significant unease among farmers arises from the Bayer/Monsanto merger, as they fear potential price hikes and a substantial decrease in the array of products accessible to them. These apprehensions find support in a comprehensive legal study by University College London, led by Professor Ioannis Lianos, which asserts that the Bayer Monsanto merger should be denied approval.[44] The study cites five critical reasons why EU competition law mandates

[40] Ibid.
[41] Guderian (n 34).
[42] Ibid.
[43] Notably, BASF is a significant global chemical producer and one of the companies belonging to the Big Six in the industry.
[44] Ioannis Lianos and Dmitry Katalevsky, 'Merger Activity in the Factors of Production Segments of the Food Value Chain: A Critical Assessment of the Bayer/Monsanto merger' (University College London (UCL),

blocking the merger: heightened market concentration, the risk of entrenched market power, elevated prices for farmers, the potential to lock farmers into technological dependency, decreased competition and innovation, and adverse effects on biodiversity and climate. The study urges the Commission to act and reject the merger based on legal obligations concerning both competition and broader social and environmental consequences.

Conversely, while some of the EC supporters perceive the decision to enhance competitiveness against major rivals with strong R&D capabilities, experts from diverse fields express reservations that the ultimate beneficiaries will predominantly be the merging companies themselves.[45]

Eventually, the ultimate result of this merger manifested in diminished market competition, reduced innovation in the industry, higher product prices, limited consumer choices, and a scarcity of job opportunities in agriculture — issues initially raised by farmers and experts before the higher authorities approved the Bayer/Monsanto merger. In contrast, Bayer has experienced record-breaking profits.

3.2.2. Killer Acquisitions in the Digital Market

In the rapidly evolving digital market, the strategy of corporate mergers and acquisitions has emerged as a prevalent approach for companies aiming to achieve growth, establish market dominance, and foster innovation. Often, the intent behind these strategic acquisitions is to neutralize future competition or prevent disruptive innovations from entering the market.

In terms of stifling potential innovation, smaller startups frequently introduce fresh concepts, technologies, or business approaches that can upset the existing order and pose a challenge to well-established market leaders. However, when these startups are acquired by larger

Policy Paper Series 2017/1, 2017) < ISBN 978-1-910801-13-0> accessed 13 August 2023.
[45] Huang (n 30) 3.

companies, the acquiring firms can choose to integrate their innovations into existing products, effectively controlling their trajectory and limiting their competitive impact. Alternatively, they might choose to shelve these innovations altogether to avoid cannibalizing their own offerings. This approach provides a shortcut to assimilating innovation rather than investing extensive resources in developing new techniques and functionalities from scratch. This strategy highlights the drive to assimilate innovation to bolster existing offerings and maintain relevance in the ever-evolving digital landscape.

In the context of these strategic acquisitions, prominent technology behemoths such as Facebook, Google, Apple, and Amazon have actively participated, sparking conversations about their effects on competition and consumer welfare. The absorption of potential rivals by dominant players often leads to reduced competition and fewer choices for consumers, resulting in the consolidation of power, which, in turn, may lead to higher prices, reduced quality, and fewer incentives for further innovation.[46]

Recent history vividly illustrates this phenomenon, notably by the acquisition of Instagram by Meta Platforms, Inc. ('**formerly known as Facebook**') in 2012, when Instagram was a fledgling startup with merely 13 employees. Mark Zuckerberg's strategic maneuver to acquire Instagram for $1 billion caught many off guards.[47] Yet, the latest data underscores the profound success of this acquisition, with Instagram's estimated net worth soaring to $102 billion and its user base exceeding 1 billion.[48] Continuing along this course, Facebook pursued a parallel strategy through its acquisition of WhatsApp in 2014, a topic we will explore further below.

[46] Aline Michelle and Alves Fulgencio, 'Killer Acquisitions and European Merger Control in the Digital Era' (Master's thesis, Lund University School of Economics and Management 2021) 19.
[47] Office of Fair Trading, 'Anticipated acquisition by Facebook Inc of Instagram Inc' (OFT ME/5525/12, 2012), 1-2.
[48] Stefan Campbell, 'How Much Is Instagram Worth In 2023? (Net Worth)' (*The Small Business Blog*, 31 August 2023) < https://thesmallbusinessblog.net/how-much-is-instagram-worth/>accessed 10.09.2023

In this context of antitrust enforcement, it's noteworthy that out of 1,149 mergers involving gatekeepers from 1987 to July 2022, the European Commission reviewed only 21 mergers. Most of these mergers fell below the EU and national merger control thresholds due to the low or non-existent turnover of the merger target.[49]

Briefly, the evolving digital landscape and the implications of killer acquisitions underscore the need for regulatory bodies and competition authorities to closely scrutinize these practices in the digital market. As tech giants continue to strategically acquire innovative startups, there is a growing recognition that traditional merger evaluation frameworks may need to be adapted to effectively address the nuances of this dynamic and rapidly changing environment. Ensuring healthy competition, fostering innovation, and safeguarding consumer welfare remain pivotal objectives in this complex landscape. As we contemplate the delicate balance between innovation and competition, it becomes evident that the evolving digital terrain demands a proactive approach. Regulatory frameworks must be agile and responsive to effectively tackle the challenges posed by killer acquisitions, paving the way for a digital market that thrives on healthy competition, encourages innovation, and ultimately benefits consumers and the broader technological ecosystem.

Illustrations of approved 'killer acquisitions' that have cast doubt on the efficacy of current thresholds can be seen in the digital market. For instance, the European Commission granted its approval for the Google/DoubleClick[50] and Facebook/WhatsApp[51] cases, decisions that sparked substantial criticism.

[49] Christophe Carugati, 'Which mergers should the European Commission review under the Digital Markets Act?' (*bruegel*, 09 December 2022) <https://www.bruegel.org/policy-brief/which-mergers-shouldeuropean-commission-review-under-digital-markets-act> accessed 07.01.2023.
[50] Case M.4731 *Google/ DoubleClick* [2008] OJ C184.
[51] Case M.7217 *Facebook/WhatsApp Commission Decision* [2014] OJ C417/4.

Google/DoubleClick

For an extended period, Google has held a dominant position within the digital advertising industry. Google Ads, its advertising platform, empowers businesses to create and manage online ad campaigns, targeting specific audiences through demographics, interests, and search keywords. Google also operates the Google Display Network—an expansive web of websites and mobile apps where advertisers can showcase their ads.

In contrast, DoubleClick, a specialized digital marketing company, focused on delivering ad serving and ad management technology to advertisers, publishers, and agencies.[52] Their platform enabled advertisers to present precisely targeted ads to online users. Its technology played a pivotal role in optimizing ad campaigns and tracking their performance.[53] Briefly, the core of DoubleClick's business was ad serving—a service that Google offered only as an ancillary aspect alongside its primary service of providing online ad space.[54]

In April 2007, Google completed the acquisition of DoubleClick for approximately $3.1 billion. The acquisition raised concerns among regulators and privacy advocates who were apprehensive about Google gaining excessive control over online advertising and user data. The worry centered on Google potentially tracking users' online behavior across various websites and services, thereby further consolidating its dominance in the online advertising market.[55]

A significant concern surrounding Google's advertising practices has revolved around its collection and utilization of user data. As a major provider of online services like search, email, and video sharing, Google has access to substantial user information. While this data can

[52] *Google/ DoubleClick* (n 50) paras 4-5.
[53] European Commission, 'Mergers: Commission clears proposed acquisition of DoubleClick by Google' (2008)< https://ec.europa.eu/commission/presscorner/detail/en/IP_08_426> accessed 10.01.2023
[54] *Google/ DoubleClick* (n 50*)* paras 4-5.
[55] Julia Brockhoff , Bertrand Jehanno , Vera Pozzato , Carl-Christian Buhr , Peter Eberl and Penelope Papandropoulos , 'Google/DoubleClick: The first test for the Commission's nonhorizontal merger guidelines' (Competition Policy Newsletter, 2008) 53, 53.

personalize and target ads, it also sparks privacy apprehensions. Critics argue that Google's data collection methods might infringe on user privacy, especially if the data is shared or used in ways users aren't fully aware of or haven't consented to.[56] Critics additionally contend that Google's position is tied to its dominant share in the advertising market. Owing to its widespread presence and substantial user base, Google commands a significant portion of the online advertising sector.

The acquisition held significance for Google as it broadened its advertising reach, enabling the company to offer more comprehensive advertising solutions to clients. DoubleClick's technology allowed Google to deliver targeted ads across its network and partner sites, enhancing relevance. According to third-party complainants, the merger provided Google with a unique edge over competitors like Yahoo! or Microsoft by amalgamating and leveraging consumer internet usage data.[57]

This has sparked concerns about potential antitrust issues, with some asserting that Google's market power could stifle competition and harm other advertising platforms or publishers. In certain jurisdictions, regulators and competition authorities have initiated investigations and legal actions to scrutinize Google's advertising practices and evaluate their compliance with antitrust laws.

In November 2007, the Commission commenced a comprehensive to address the concerns and theories of harm raised in relation to the case.[58] Nevertheless, the Commission eventually granted approval for the acquisition.[59]

The European Commission focused solely on analyzing the horizontal overlap of the Google and DoubleClick merger. Horizontal effects refer to the potential impact of a merger on

[56] Massimiliano Kadar and Mateusz Bogdan, ''Big Data' and EU Merger Control - A Case Review' (2017) 8(8) Journal of European Competition Law 479, 480.
[57] Ibid 480.
[58] Mergers: Commission clears proposed acquisition of DoubleClick by Google (n 53).
[59] *Google/ DoubleClick* (n 50*)* paras 367-368.

competition between companies that operate in the same market or offer similar products or services. In this case, the EC's analysis conducted on whether there was significant horizontal overlap in terms of the services offered by Google and DoubleClick. This involved assessing whether the companies were direct competitors providing similar services to the same target market. In its assessment, the EC considered various factors, such as the extent to which Google and DoubleClick competed in the provision of online advertising space, intermediation services, and ad-serving tools. They examined whether the merger would result in a reduction of competition in these areas.[60]

The Commission's deliberation led to the determination that the transaction would not substantially obstruct competitive practices, nor would it likely lead to adverse repercussions for consumers, whether in ad serving or intermediation within online advertising markets.[61]

Market Dominance:

In line with the European Commission's statement, Google and DoubleClick occupied distinct segments within the online advertising industry. This delineation meant they were not significantly impeding each other's operations in terms of competition. Hence, they couldn't be classified as direct competitors.[62]

Furthermore, the Commission concluded that post-merger, Google would lack the capacity and incentive to hinder competitors or escalate their costs based on its market influence, DoubleClick's market position, or their combined market standings.[63] This was chiefly because such strategies were improbable to yield profits.[64]

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[60] Ibid.
[61] Mergers: Commission clears proposed acquisition of DoubleClick by Google (n 53).
[62] David Lawsky, 'Google Closes DoubleClick Merger After EU Approval' (*Reuters*, 11 March 2008) <https://www.reuters.com/article/us-google-doubleclick-eu-idUSBFA00058020080311> accessed 11.01.2023.
[63] PLC Competition, 'Summary of Google/DoubleClick merger decision published' (*Thomson Reuters Practical Law*, 22 July 2008) < https://uk.practicallaw.thomsonreuters.com/8-382-8036?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 11.01.2023.
[64] Mergers: Commission clears proposed acquisition of DoubleClick by Google (n 53).

Ad & Privacy Concerns:

The Commission evaluated the potential horizontal effects of the merger, considering competition among various channels for online advertising space. This included the option of selling intermediation and ad serving tools separately or as a bundled service. The analysis indicated that there were no significant constraints imposed by either Google or DoubleClick on each other.[65]

The Commission dismissed concerns surrounding the potential misuse of DoubleClick's data by Google.[66] According to the Commission's assessment, only a limited number of respondents acknowledged that Google's access to DoubleClick's data could potentially enhance its ad targeting capabilities.[67] It was established that DoubleClick's prevailing contracts restricted the utilization of consumer data for ad serving purposes beyond the specific advertisers and publishers involved. Additionally, the feasibility of the merged entity enforcing changes to these contracts was deemed low due to the mutual interest of publishers and advertisers in preserving data separation.[68]

Ultimately, even if contract modifications were enacted, the potential benefits stemming from the transaction would be diminished by the competitive landscape within the ad serving market, particularly from vertically integrated companies like Microsoft, Yahoo!, and AOL.[69] Therefore, the Commission determined that removing DoubleClick as a possible competitor would not negatively affect competition within the market for online intermediation advertising services.[70]

[65] Brockhoff, Jehanno, Pozzato, Buhr, Eberl and Papandropoulos (n 55) 56.
[66] Kadar and Bogdan (n 56) 480.
[67] *Google/ DoubleClick* (n 50*)* para 337.
[68] Kadar and Bogdan (n 56) 480.
[69] Ibid 480.
[70] Mergers: Commission clears proposed acquisition of DoubleClick by Google (n 53).

Observations

The approval of the Google/DoubleClick deal, following a comprehensive investigation by European competition officials, encountered opposition from competitors and privacy advocates. Critics expressed concerns about the merging companies' integration of data collection methods, suggesting potential for market power abuse, price control, or harm to competitors.[71]

Moreover, the merger of Google and DoubleClick falls into the category of non-horizontal mergers as per EU Competition law, given their distinct market operations. However, during the analysis of the acquisition, the EC applied the principles of horizontal effect assessment to determine any potential competitive impact. In doing so, the EC chose not to explore the evaluation of non-horizontal aspects and this emphasis led to approval without imposing any conditions.

In the context of non-horizontal mergers, such as the combination of Google and DoubleClick, direct competition between merging entities in the same market isn't the focus. Instead, the merger revolves around integrating complementary services and technologies to bolster Google's standing in the online advertising industry. However, it's crucial to underline that regulatory bodies scrutinize non-horizontal mergers to prevent outcomes like market dominance or competitor exclusion. In this particular scenario, it would have been advisable for the EC to conduct a thorough assessment of non-horizontal factors.

In the end, Google's continuous integration of DoubleClick's technology into its advertising ecosystem showcases the company's efforts to enhance its advertising offerings. Over time, Google introduced diverse products and platforms like Google Ads, Google Marketing Platform, and Google Ad Manager, all incorporating DoubleClick's technology and capabilities. Hence, this demonstrated the pressing need for a European Regulation.

Consequently, the EC did not delve into the assessment of non-horizontal aspects in this

[71] Lawsky (n 62).

case. Although the non-horizontal assessment has not been done, this represents one of the initial instances of a substantial evaluation of non-horizontal effects subsequent to the adoption of the Non-Horizontal Merger Guidelines.[72] Furthermore, the Google/DoubleClick transaction stands out as an early example of the European Commission incorporating 'big data' considerations into merger assessments.[73]

Facebook/WhatsApp

Facebook is involved in diverse sectors including social networking, online advertising, photo/video sharing, and consumer communication. This scope encompasses platforms like 'Facebook Messenger' and 'Instagram'.[74] Conversely, WhatsApp's primary focus revolves around offering consumer communication services through its mobile app, without delving into the sale of advertising space.[75]

On February 19, 2014, Facebook's decision to merge with WhatsApp came with a significant price tag of $ 19 billion.[76] At the time of the acquisition, WhatsApp had 450 million active users each month and was adding one million new users daily. A significant detail is that more than seventy percent of WhatsApp users used the app daily, and its messaging volume was comparable to the total global telecom SMS messages.[77] Additionally, Facebook catered to over 1.2 billion monthly active users.[78] Thus, mounting concerns emerged due to Facebook's apparent aim to eliminate a potential competitor in WhatsApp and leverage its user base for the advantage of Facebook. Eventually, this acquisition underwent scrutiny by the European Commission.

[72] Ibid.
[73] Kadar and Bogdan (n 56) 479.
[74] *Facebook/WhatsApp* (n 51) para 2.
[75] Ibid para 3.
[76] *Facebook/WhatsApp* (n 51) para 4.
[77] Mark Glick and Catherine Ruetschlin, 'Big Tech Acquisitions and the Potential Competition Doctrine: The Case of Facebook' (October 2019) Institute for New Economic Thinking Working Paper No.104, 43<https://doi.org/10.36687/inetwp104>accessed 11 September 2023.
[78] Ibid 44.

However, upon concluding that the acquisition would not significantly impede competition within the European Economic Area ('**EEA**'), the EC provided its approval for the transaction.[79]

Consumer Communications:

The EU primarily examined the merger within the context of the consumer communications services market, rather than as a potential competition merger. This category encompasses standalone applications like WhatsApp, Viber, Line, WeChat, Facebook Messenger, and Skype, as well as those integrated with smartphone hardware or operating systems, such as Apple's iMessage.[80]

In their analysis of consumer communications services, the European Commission determined that WhatsApp and Facebook did not directly compete in the terms of consumer communication services. This was due to factors like low switching costs, users' inclination to use multiple platforms, and the overlap in their user bases. These elements collectively weakened any obstacles to entry arising from the network effects generated by the merged companies.[81] In other words, the Commission's rationale was underscored by the existence of numerous alternative applications accessible to consumers. Moreover, the degree of overlap between the two entities varied across the EU member states, with countries like Spain, France, and other Member States experiencing relatively limited application penetration.[82]

In its evaluation, the Commission factored in the attributes of the consumer communications market as well as the intricate technical challenges associated with integrating the user networks of WhatsApp and Facebook. Consequently, the Commission concluded that Facebook's ability to eliminate its competitors after the transaction was unlikely.[83]

[79] *Facebook/WhatsApp* (n 51) para 191.
[80] Ibid para 15.
[81] Glick and Ruetschlin (n 77) 48.
[82] Kadar and Bogdan (n 56) 482.
[83] Ibid 482.

Regarding the online advertising services market, WhatsApp was not engaged in online advertising and primarily collected only usernames and mobile phone numbers, data that was not particularly valuable for advertising purposes. The Commission acknowledged that there was no direct overlap between Facebook and WhatsApp in this aspect.[84]

Social networking:

The EU also examined the social networking market and found no issues of competition. According to their analysis, WhatsApp wasn't seen as part of the social networking market because it lacked various functions like contact lists, user profiles, relationship status, and other social features.[85]

While some saw WhatsApp as a social network, the Commission gave more weight to WhatsApp's management stating they had no plans to compete as a social network against Facebook. The Commission believed that considering WhatsApp a social networking competitor would broaden competition sources, including other big players like LINE, WeChat, iMessage, Skype, Snapchat, Viber, and Hangouts. This would reduce concerns about competition being harmed by the elimination of a single rival.[86]

Privacy:

However, the Commission expressed concerns about a potential scenario in which the merged entity could start collecting data from WhatsApp users to enhance the accuracy of targeted ads on Facebook's social networking site. This could potentially strengthen Facebook's position in the online advertising market by monetizing the increased data from WhatsApp users through advertising.

[84] *Facebook/WhatsApp* (n 51) paras 108-126.
[85] Ibid 145.
[86] Glick and Ruetschlin (n 77) 48.

However, the Commission's apprehension was deemed unconvincing for several reasons. Firstly, collecting data from WhatsApp users would necessitate changes in WhatsApp's privacy policy, risking user migration to alternative communication services due to privacy concerns. This was evident from the significant number of users who switched to competitors like Telegram and Threema following the transaction announcement. Secondly, matching each user's WhatsApp profile with their Facebook profile, as claimed by Facebook, posed technical challenges. Thirdly, alternative providers of online search advertising, particularly Google, would continue to exist post-acquisition. Lastly, numerous market participants were already collecting user data alongside Facebook.[87]

The assertions that technical challenges hindered integration were contradicted when, merely two years later in 2016, Facebook started incorporating WhatsApp user data into the Facebook social graph. Following this development, the EU imposed a €110 million ($122 million) fine on Facebook for deceiving the Commission. Nevertheless, the EU did not overturn their approval of the acquisition.[88]

Observations

This occurrence underscores the significance of this case, as it marks the initiation of investigations into 'killer acquisitions' by the European Commission. The EC has grown increasingly concerned about the current EUMR thresholds' insufficiency in effectively addressing killer acquisitions. This refers to acquiring highly innovative companies whose current revenue fails to reflect their true competitive significance. These acquisitions, orchestrated by established industry players, aim to eliminate potential future competition. Consequently, this case

[87] Kadar and Bogdan (n 56) 482.
[88] European Commission, 'Mergers: Commission fines Facebook €110 million for providing misleading information about WhatsApp takeover' (2017)< https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2705>accessed 09.01.2023.

gains added importance as it highlights the EC's initial steps in investigating killer acquisitions and their implications.

The EU's analysis spotlights concern regarding the potential competition doctrine. To begin, assessing concentration in social networking and mobile messaging markets faces similar challenges observed in the Instagram acquisition, where effective measurements and reliable data sources are lacking.[89] Although user numbers (provided by Facebook) are used to estimate market shares, the European Commission acknowledges the absence of adequate guidelines.[90]

Moreover, the presumed ease of entry and comprehensive evaluation of potential competitors neglects the data barrier that reinforces a firm's dominance in online platform markets. This complexity hampers regulators' ability to isolate the impact of eliminating individual rivals.[91] Merely highlighting potential harm to future competition wasn't sufficient to challenge the merger.[92]

After the decision favoring Facebook, both Germany and Austria launched inquiries into the practice of killer acquisitions and their potential adverse impact on competitive markets, resulting in the adoption of value-based thresholds. Following that, the EC was prompted to reevaluate the landscape of 'killer acquisitions'. During this period, the focus was on possibly introducing value-based thresholds. However, in 2020, the EC chose to address the 'killer acquisition' issue through the referral mechanism already included in Article 22 of the EUMR.

[89] Glick and Ruetschlin (n 77) 49.
[90] Ibid 49-50.
[91] Ibid 50.
[92] Ibid 50.

3.3. Killer Acquisitions in the EU

The Commission has voiced concerns regarding the limitations of the current turnover thresholds in adequately evaluating transactions of significant importance that lack substantial turnover.[93] Addressing these concerns, the Commission has undertaken an evaluation to gauge the effectiveness of the turnover-based jurisdictional thresholds established in the EU Merger Regulation.[94] In its execution of merger control, the European Commission has affirmed the adequacy of the prevailing tools and theories of harm to effectively address potential concerns. However, historical assessments have primarily concentrated on established market frameworks, often overlooking the potential or emerging competitive factors.[95]

Furthermore, this assessment emphasizes that while the established thresholds and referral mechanisms outlined in the Merger Regulation have generally succeeded in capturing transactions with significant competitive impact within the EU internal market, there remain specific instances persist, particularly evident in the digital and pharmaceutical sectors. These cases have managed to evade scrutiny from both the Commission and Member States, despite their potential to wield substantial influence over competition dynamics.[96] Nonetheless, a comprehensive evaluation of potential competition law violations necessitated a dynamic analysis, underscoring the need for more in-depth and qualitative assessments.[97]

Subsequently, the European Commission initiated a thorough exploration of potential remedies in light of these concerns. Notably, Austria and Germany have favored the adoption of the 'transaction value threshold' as their chosen approach. In contrast, the European Commission

[93] Turgot (n 19) 112.
[94] Schrijvershof, van de Hel and Breithaupt (n 16).
[95] Turgot (n 19) 112-114
[96] Guidance on article 22 EUMR (n 28) paras 10-11.
[97] Turgot (n 19) 115.

has taken a unique route by invoking Article 22 to address the matter of so-called 'killer acquisitions'.

3.3.1. Assessing Transaction Value Thresholds and Cross-border Acquisitions in Germany and Austria

Germany voiced apprehensions regarding the oversight of 'killer acquisitions'. A notable example was Facebook's acquisition of WhatsApp, with Germany emphasizing that WhatsApp's turnover fell below the national threshold, raising concerns.[98] This scenario has triggered a deliberation concerning the evaluation of acquisitions based on specific transaction values.[99] Similar discussions have also emerged in Austria. Eventually, in a joint effort, both the German Bundeskartellamt and the Austrian Bundeswettbewerbsbehörde introduced transaction value thresholds in their collaborative guidelines back in 2017, specifically addressing mandatory merger notifications.[100]

According to the guidelines jointly issued by these two countries, transactions falling below the turnover threshold but exceeding €400 million in Germany and €200 million in Austria may necessitate notification if the target company holds significant domestic operations.[101] Furthermore, these guidelines offer insights and examples to help assess the concept of 'substantial domestic operations' when gauging the value of the deal. However, the practical implementation of these guidelines still faces significant uncertainty and requires further clarity on various aspects. Thus, this approach has attracted noteworthy attention and raised concerns among both other EU member states and the European Commission.

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[98] Schrijvershof, van de Hel and Breithaupt (n 16).
[99] Ibid.
[100] Bundeskartellamt and Bundes Wettbewerbs Behörde, 'Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG)' (Bundeskartellamt and Bundes Wettbewerbs Behörde July 2018).
[101] Ibid para 36.

3.3.2. Article 22 Guidance

On March 26, 2021, the European Commission released the Article 22 Guidance[102], which outlines the operational specifics of the mechanism as defined in Article 22 of the EU Merger Regulation. Within this context, the Commission utilizes this mechanism to confront the issue presented by anti-competitive 'killer acquisitions'.

(i) Purpose of Previous Article 22

Historically, the primary objective of Article 22 was to address the void in the realm of merger control regulations. When the original European Merger Regulation (4064/89)[103] was established, certain nations, including the Netherlands, Italy, and Luxembourg, lacked their own distinct national merger control frameworks. To remedy this gap, Article 22, often referred to as the Dutch clause was established in 1989. This aimed to provide legal clarity and grant the Commission the authority to refer mergers impacting competition in these countries to the European level. This adjustment sought to establish merger control in nations and mitigate potential competition distortions.[104]

Article 22 of the EUMR outlines the criteria governing the referral process by one or more Member States to the Commission. This article establishes two essential prerequisites[105]:

- The merger must impact trade between Member States.
- The merger must pose a significant threat to competition within the territory of the requesting Member State(s), regardless of their authority to review the merger under national legislation.[106]

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[102] Guidance on article 22 EUMR (n 28).
[103] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1989] OJ L 257/90.
[104] Vaclav Smejkal, 'Concentrations in Digital Sector - A New EU Antitrust Standard For "Killer Acquisitions" Needed?' (2020) 7(2) InterEULawEast 1, 10.
[105] Guidance on article 22 EUMR (n 28) para 13.
[106] Paolo Palmigiano, 'Casting the merger control net wide – the General Court's judgement in Illumina v

Article 22 of the EUMR does not grant Member States the authority to review cases occurring in different jurisdictions. Instead, it empowers Member States to request the European Commission for an investigation into transactions that could influence competition within their own territories but don't meet the criteria for European-level review. It is designed to tackle situations where a transaction falls below the mandatory notification thresholds dictated by EU or national merger control regulations, yet still holds the potential to significantly influence competition within a Member State. Consequently, Article 22 helped maintain competitive balance in countries lacking sufficient merger control regulations.[107]

However, the European Commission maintained a longstanding stance of discouraging referrals from Member States lacking the authority to assess transactions based on their own national merger control regulations, despite the provision offered by Article 22 of the EUMR.[108] The rationale behind this approach is that the Commission did not anticipate these transactions to exert a significant impact on the internal market.[109] Thus, over time, due to the establishment of national merger control frameworks in numerous European countries, the utilization of Article 22 has become limited.[110]

(ii) New Approach of Article 22

Due to the Commission's established policy, a significant number of transactions that lie beneath the turnover threshold have occurred within both EU and national merger control

Commission' (*Taylor Wessing*, 29 July 2022 <https://www.taylorwessing.com/fr/insights-andevents/insights/2022/07/casting-the-merger-control-net-wide> accessed 11 September 2023.

[107] Michelle and Fulgencio (n 46) 28.

[108] Latham&Watkins, 'Antitrust Client Briefing: New Guidance on Article 22 EUMR referrals to the European Commission' (*Latham&Watkins,* 30 March 2021). < https://www.lw.com/admin/upload/SiteAttachments/LW%20Antitrust%20Briefing_Article%2022%20EUMR%20Guidance_March%202021.pdf> accessed 10.02.2023.

[109] Guidance on article 22 EUMR (n 28) para 8.

[110] Michelle and Fulgencio (n 46) 28.

frameworks. This has resulted in noteworthy consequences for the competitive market and potential competitors who are yet to achieve significant revenues but possess considerable market potential.[111] In response to this identified enforcement gap surrounding killer acquisitions, the Commission has introduced a new guideline that signifies a notable departure from its former approach.

In the new approach, the Commission has made the decision to consider referrals, even if they fall short of the national merger control threshold. This is subject to meeting the criteria specified in Article 22, which encompass requirements like '*the transaction's impact on trade between Member States' and 'pose a significant threat to competition*'.[112] This aims to capture transactions that would not have been subjected to merger review within prior circumstances and guarantees that pertinent transactions are evaluated by the Commission without imposing a mandatory notification on transactions that don't warrant such examination.[113] Notably, this shift in procedure did necessitate any amendments to relevant provisions of the Merger Regulation.[114] Hence, marking a departure from its conventional stance on Article 22 of the EUMR, the Commission introduced a significant change in 2021 through the publication of a guideline that outlines its revised application—*The Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases*.[115] With the release of the Article 22 Guidance, the Commission has taken the stance of evaluating referrals, even when the national merger control regulations of Member States fail to meet the thresholds or lack regulatory provisions altogether.

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[111] Latham&Watkins (n 108).
[112] Ibid.
[113] Ibid.
[114] Guidance on article 22 EUMR (n 28) para 11.
[115] Luxembourg Competition Authority, 'The Luxembourg Competition Authority joins a request under the EU Merger Regulation to assess the proposed acquisition of Figma by Adobe' (Actualités - Autorité de la concurrence, 06.03.2023) https://concurrence.public.lu/fr/actualites/2023/03-06-merger-control.html> accessed 12 September 2023.

Furthermore, the Guidance offers clarity on preliminary indicators employed to identify transactions that might raise potential competition concerns. These indicators encompass scenarios such as the potential establishment or reinforcement of a dominant market position, the removal of a crucial competitive participant like a recent entrant, the reduction of competitors' capability or motivation, or the exploitation of a robust market position from one sector to another through strategies like tying or bundling.

(iii) Article 22 Guidance

The Guidance thoroughly examines the procedural and jurisdictional dimensions of European merger control, leading to a significant transformation of the EU merger control system.[116] The primary aim is to prompt national competition authorities across the European Union to forward transactions that lie beneath the EU or national merger control thresholds. This proactive approach guarantees that these transactions don't escape assessment within the framework of the European Union's merger control regulations.[117]

The Guideline provided by the European Commission subtly addresses the concept of 'killer acquisitions' (although not explicitly termed as such), with a specific emphasis on acquisitions of startups and mergers that manage to avoid thorough examination. This attention is directed towards scenarios where at least one party's turnover fails to accurately reflect its competitive potential, whether present or future.[118]

Initially, the EC considered modifying the EUMR's merger control thresholds by introducing a transaction value threshold.[119] However, rather than amending the EUMR, the EC

[116] Schrijvershof, van de Hel and Breithaupt (n 16).
[117] Sebastian Jungermann and Daniel Bunsen, 'Killing "Killer Acquisitions": Is the EC Going Too Far With Its Policy Shift on Referrals Under Article 22 of the Merger Regulation?' (*Lexology*, 10 March 2022).
[118] Michelle and Fulgencio (n 46) 30.
[119] Dr. Tilman Kuhn, Strati Sakellariou-Witt, Axel Schulz and Peter Citron, 'EU General Court confirms European Commission's Article 22 EUMR referral policy' (*White & Case,* 18 July 2022) <https://www.whitecase.com/insight-alert/eu-general-court-confirms-european-commissions-article-22-eumrreferral-

has chosen to expand the ambit of Article 22, often referred to as the 'Dutch clause'. Eventually, this approach was deemed suitable to address the issue at hand.[120]

Within the guidance, clarity is provided on Article 22 of the Merger Regulation, detailing the specific conditions set by the European Commission that must be fulfilled.[121] As mentioned earlier, to initiate such a referral:

• The merger must impact cross-border trade among Member States.[122]

• A significant competition threat within the requesting Member State(s) is necessary.[123]

As articulated in Recital 11 of the Guidance, the Commission aims to promote and embrace referrals that align with the criteria set out in Article 22, regardless of whether the initiating Member State holds initial jurisdiction.[124]

Furthermore, in addition to discussing the requirements detailed in Article 22, the EC also highlights new comprehensive criteria within the Guidance that warrant consideration. These include the types of scenarios that generally merit a referral under Article 22 of the Merger Regulation when the merger isn't subject to notification in the Member State(s) making the referral. These instances revolve around situations where the revenue of at least one of the participating entities doesn't truly reflect its genuine or predicted competitive capability.[125]

In the guidance, an undertaking could qualify as a killer acquisition target if it meets one or more of the following criteria: (i) It's a startup or recent entrant with promising competitive potential but limited revenues (or is in the early phases of implementing such a model), (ii) It functions as a notable innovator or is actively engaged in research with significant potential, (iii)

policy> accessed 16.02.2023.
[120] Michelle and Fulgencio (n 46) 29.
[121] Guidance on article 22 EUMR (n 28).
[122] Ibid para 13.
[123] Ibid para 13.
[124] Ibid para 11.
[125] Ibid para 19.

it holds substantial and actual or potential competitive influence, (iv) It possesses access to critical competitive assets, such as raw materials, infrastructure, data, or intellectual property rights, or (v) It provides products or services that play a pivotal role as fundamental inputs/components for other industries.[126]

The Guidance explicitly clarifies that these categories serve as illustrative examples and do not constitute an exhaustive list.[127] This underscores the EC's intention to maintain significant discretion in determining transactions eligible for Article 22 referrals in the future. In assessing cases, the Commission may also consider whether the value received by the seller notably exceeds the present turnover of the target.[128]

The categories outlined in the Guidance align with the European Commission's objective to intensify scrutiny over transactions that raise concerns about potential competition or innovation loss, as well as restricted access to essential infrastructure. Similar approaches by other jurisdictional bodies, such as the Competition and Markets Authority ('**CMA**') in the UK, also highlight this trend, particularly in dynamic and innovative sectors. For instance, the CMA recently broadened its merger assessment guidelines to adopt a comprehensive perspective, evaluating if transactions result in future or dynamic competition loss.[129]

Moreover, while the guideline primarily focuses on the pharmaceutical/biotech and digital sectors due to the prevalence of mergers involving potential targets in these areas, its applicability isn't limited to these sectors.[130]

Concerning Article 22's deadlines, a closed transaction doesn't prevent a Member State

[126] Ibid para 13.
[127] Ibid para 20.
[128] Ibid para 19.
[129] Rikki Haria, Carmen Virgos and Sharon Malhi, 'The European Commission publishes guidance on its broadened Member State referral system – but unpredictability and uncertainty remains' (*Freshfields Transactions Blog*, 31 March 2021) < https://transactions.freshfields.com/post/102guir/the-european-commission-publishesguidance-on-its-broadened-member-state-referral> accessed 17.02.2023.
[130] Ibid.

from seeking a referral. Yet, the Commission may consider time passed since closure when deciding on a referral request. Typically, a referral may not be suitable if over six months have passed since the merger's completion. If the merger wasn't public knowledge, the six months count from when key details were made public in the EU. In special cases, a later referral could be considered, based on potential competition concerns and the potential adverse impact on consumers.[131] However, the guideline lacks a specific time limit for closed transactions, leading to potential challenges within the system.

Furthermore, the Commission collaborates closely with Member States' authorities to identify potential referrals under Article 22 that might not meet national jurisdictional criteria. Information exchange occur with national competition authorities while maintaining confidentiality.[132] Merging parties can proactively provide information about their plans, and the Commission might signal if their concentration isn't likely for a referral under Article 22, based on a preliminary assessment.[133] Third parties can notify the Commission or Member States' authorities of possible referral candidates, requiring sufficient preliminary information.[134]

If the Commission identifies a suitable referral, it may invite concerned Member State(s) to request a referral, with the decision lying with the Member State's authorities.[135] When considering a referral request, the Commission informs transaction parties promptly, but this doesn't compel them to act, although they might choose to delay implementation pending the referral decision.[136] If no formal notification is needed, a referral request should be initiated within 15 working days at most from the date when the concentration's details are otherwise made known

[131] Guidance on article 22 EUMR (n 28) para 21.
[132] Ibid para 23.
[133] Ibid para 24.
[134] Ibid para 25.
[135] Ibid para 26.
[136] Ibid para 27.

to the relevant Member State.[137]

Once a referral request is submitted, the Commission promptly informs the competent authorities of Member States and the involved entities and the Member States have a 15-working-day window after Commission notification to join the request. The Commission encourages mutual communication among Member States and itself regarding their intent to participate.[138] Subsequently, within 10 working days after the 15-day period for Member States to join, the Commission can choose to examine the concentration if it believes it affects cross-border trade and competition significantly in the requesting Member State(s). If no decision is reached within this timeframe, it's considered as consent for examination.[139]

As an initial instance, the case Illumina/Grail represents the recent implementation of Article 22 of the EUMR.

Illumina/Grail

Illumina, the U.S. biotech company, expressed its intention to acquire Grail LLC, a U.S. healthcare company known for its pioneering work in developing blood tests for early-stage cancer diagnosis, with the transaction valued at approximately US$7.1 billion.[140] However, it's worth noting that this transaction did not trigger the mandatory notification thresholds outlined in the EUMR or any merger review regulations of the Member States.[141] This was primarily due to the fact that Grail's product portfolio was non-operational and generated no revenue at the time.[142]

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[137] Ibid para 28.
[138] Ibid para 29.
[139] Ibid para 30.
[140] Michelle and Fulgencio (n 46) 33.
[141] Jay Modrall, 'Illumina/Grail Prohibition: The End of the Beginning for EU Review of "Killer Acquisitions"?' (*Kluwer Competition Law Blog*, 8 September 2022) <https://competitionlawblog.kluwercompetitionlaw.com/2022/09/08/illumina-grail-prohibition-the-end-of-thebeginning-
for-eu-review-of-killer-acquisitions/> accessed 21.02.2023.
[142] Renaud Foucart, 'Tech Firms Face More Regulation After Moves to Stop 'Killer' Acquisitions – but

Despite the limited impact of this transaction on Illumina's dominant market position, both U.S. and EU regulators expressed concerns about its potential adverse effects on competition in the realm of next-generation sequencing-based cancer testing.[143] Consequently, the Commission initiated a referral request. Upon the Commission extending an invitation, the French National Competition Authority promptly submitted a referral, which in turn encouraged the involvement of numerous other states.[144]

Also, many regulators voiced significant apprehensions about the high level of market concentration in genome-based diagnostic tests, emphasizing its negative implications for competition, innovation,[145] and the prospects for new entrants to succeed.[146] Responding to these concerns, the Commission accepted the referral, along with 19 other requests to join.[147]

On July 22, 2021, the Commission launched an in-depth investigation into Illumina's proposed acquisition of Grail.[148] During the investigation, Illumina publicly announced the completion of its acquisition of Grail, even as the Commission's review of the proposed transaction was still pending.[149] Thus, to address the concerns arising from Illumina's early acquisition of Grail, the Commission adopted interim measures, aimed at restoring and maintaining conditions of effective competition. Notably, this marked the first instance where the Commission employed interim measures in response to an unprecedented early implementation of a concentration.[150]

Innovation Could Also Be Under Threat' (*The Conversation,* 25 July 2022) >https://theconversation.com/tech-firmsface-
more-regulation-after-moves-to-stop-killer-acquisitions-but-innovation-could-also-be-under-threat-187278> Accessed 22.02.2023.

[143] Ibid.

[144] Michelle and Fulgencio (n 46) 33.

[145] Foucart (n 142).

[146] Michelle and Fulgencio (n 46) 33.

[147] Ibid.

[148] European Commission, 'Mergers: Commission prohibits acquisition of GRAIL by Illumina' (2022)<https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5364> accessed 23.02.2023

[149] Ibid.

[150] European Commission, 'Mergers: Commission fines Illumina and GRAIL for implementing their acquisition without prior merger control approval ' (2023)<https://ec.europa.eu/commission/presscorner/detail/en/IP_23_3773> accessed 02.03.2023.

Following that, Illumina submitted a series of remedies to alleviate the competition concerns voiced by the Commission.[151]

Rejection of the commitments:

Illumina put forth a proposition to grant licenses for certain Illumina patents to Next-Generation Sequencing ('**NGS**') suppliers and made a commitment to refrain from pursuing patent litigation against BGI Genomics ('**China**') in the United States and Europe for a span of three years. This step aimed to address potential barriers to entry related to intellectual property ('**IP**'). However, market feedback deemed the commitments insufficient, citing concerns about Illumina's dominant position in the NGS systems sector. Despite being a small fraction of sales, potential foreclosure tactics could threaten competitors and hinder market competition and innovation.[152]

Additionally, Illumina committed to sign agreements with Grail's competitors until 2033. The Commission found this commitment inadequate, as it did not address all foreclosure tactics, and transitioning to a different NGS provider would be prolonged and costly. Effectively monitoring the commitments was deemed challenging, potentially allowing Illumina to circumvent them. Consequently, this situation may reduce the capability of Grail's competitors to invest in alternative blood-based tests for cancer detection.[153]

Consequently, the European Commission rejected Illumina's proposed acquisition.[154] Illumina and Grail raised objections to this decision and argued that Grail, lacking a presence in Europe, should be considered beyond the scope of merger regulation. Illumina also contended that the Commission's acceptance of a referral request from a National Competition Authority ('**NCA**') for transactions not meeting specified thresholds was unjust. Additionally, they claimed that the

[151] Mergers: Commission prohibits acquisition of GRAIL by Illumina (n 148).
[152] Mergers: Commission prohibits acquisition of GRAIL by Illumina (n 148).
[153] Ibid.
[154] Ibid.

Commission's policy violated the legal certainty principle and constituted a breach of legitimate expectations.[155]

On July 12, 2023, the European Commission enforced substantial fines on Illumina and Grail, totaling approximately €432 million and €1,000, respectively. The fines were imposed because both companies violated EU merger control rules by proceeding with their merger without prior Commission approval, regarding the 'standstill obligation', as stated in Article 7(1) of the EUMR, which requires merging companies to wait for Commission clearance to prevent potential harm to market competition. Any breach of this obligation is seen as a serious infringement, undermining the EU merger control system's effectiveness. The Commission's authority to impose fines for such violations is established in Article 14(2)(a) and (b) of the EUMR, highlighting its commitment to maintaining a fair European market.[156]

EU General Court's decision:

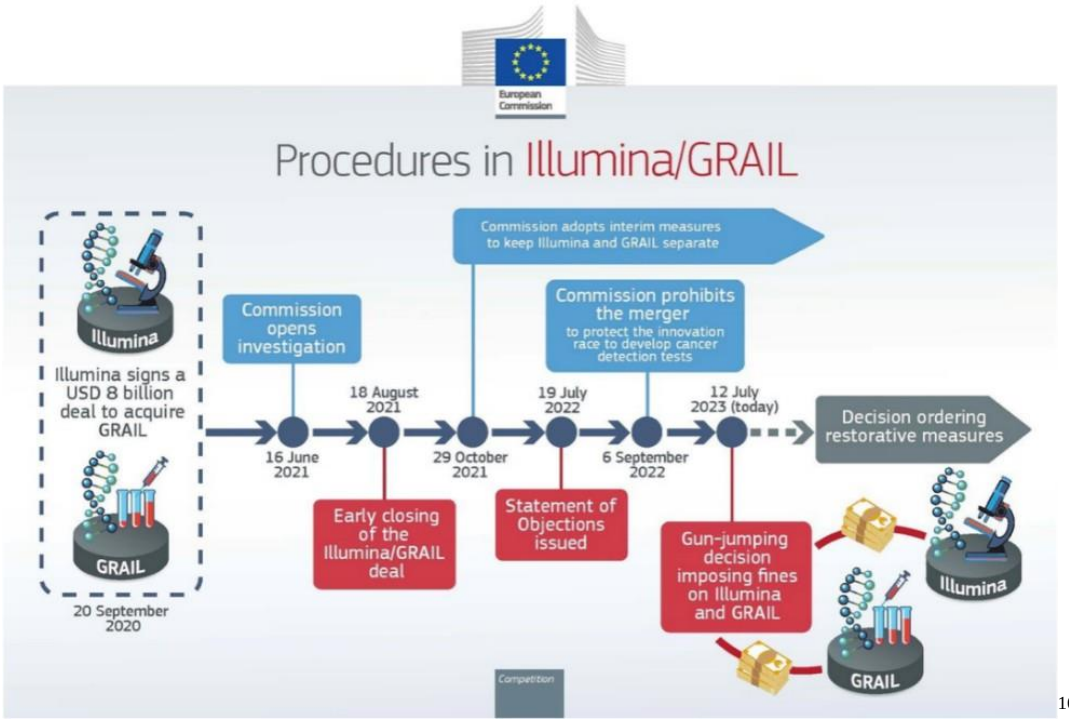
On July 13, 2022, the EU General Court upheld the Commission's referral decisions, dismissing Illumina and Grail's objections. The Court clarified that Article 22 falls within EU law jurisdiction, emphasizing consistent enforcement across member states. It highlighted the flexibility of Article 22, allowing referrals for below-threshold concentrations. The Court reinforced that Article 22 serves as an 'effective corrective mechanism,' addressing transactions that could significantly hinder EU market competition.[157]

The General Court's decision confirmed that Article 22 transactions need not comply with specific Member State merger control rules, asserting the Commission's authority over mergers,

[155] Ibid.
[156] Mergers: Commission fines Illumina and GRAIL for implementing their acquisition without prior merger control approval (n 150).
[157] Judgment of the General Court of 13.07.2022, T-227/21, Illumina Inc. v European Commission, EU:T:2022:447.

even if they don't meet national requirements.[158] However, Illumina and Grail appealed this decision in September 2022, which is currently under appeal before the Court of Justice.[159]

On October 12, 2023, the European Commission, under the EU Merger Regulation, required Illumina to reverse its prohibited acquisition of Grail. Divestment measures were implemented to restore Grail's independence, with transitional measures to keep the companies apart until the transaction is unwound. Non-compliance may result in substantial fines.[160]



[161]

[158] Ibid.
[159] Case C-611/22 P: Appeal brought on 22 September 2022 by *Illumina*, Inc. against the judgment of the General Court (Third Chamber, Extended Composition) delivered on 13 July 2022 in Case T-227/21, Illumina v Commission [2022] OJ C432; Case C-625/22 P: Appeal brought on 30 September 2022 by *Grail LLC* against the judgment of the General Court (Third Chamber, Extended Composition) delivered on 13 July 2022 in Case T-227/21, Illumina v Commission [2022] OJ C451.
[160] European Commission, 'Commission orders Illumina to unwind its completed acquisition of GRAIL' (2023)< https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4872 > accessed 17.10.2023.
[161] European CommUssUon, [image of] 'Procedures in Illumina/GRAIL' (European Commission Press Release IP/23/3773, 12 July 2023) <https://competition-policy.ec.europa.eu/system/files/2022-12/2022_Illumina_Grail_en.pdf> accessed 03.04.2023.

Observations

The Illumina/Grail case introduced significant changes in terms of jurisdiction and substance. In terms of the novelty aspect, the acquisition target, Grail, did not generate any revenue within the European Union. This contrasts with the EUMR's reliance on turnover thresholds, which necessitates that each party involved in the transaction generates some level of turnover within the European Union. This case marks the first instance where the Commission granted approval for a review.

While Article 22 brings about increased uncertainty and a deficiency in legal clarity for transactions, I believe that Illumina occupies an exceptional stance as the exclusive source of the DNA sequencing technology essential for Grail's advancement of its preliminary cancer identification blood test. This scenario entails a potential threat of limited technology access for Grail's rivals, thereby impeding the progress of comparable tests by other firms. As a result, innovation endeavors could suffer adverse consequences.

The European Commission now possesses the authority to assert jurisdiction over any transaction that could impact competition within the European Economic Area, regardless of whether the target company generates sales within Europe. This is similar to the situation in the US, where authorities can challenge transactions without regard to the merger notification thresholds. However, this broad jurisdictional approach remains subject to judicial review.

Furthermore, innovation is a crucial factor for fostering competition according to the European Commission.[162] The EC's official guidance singles out the tech and pharma sectors as key focus areas for this unlimited jurisdiction, but the same guidance also contains broader

[162] The significance of innovation as a critical factor in the competitive assessment of the European Commission was already recognized in the 2004 Horizontal Merger Guidelines and the 2008 Non-Horizontal Merger Guidelines. Addition to that, innovation is one of the criteria outlined in the Horizontal Merger Guidelines, serving as a measure to determine whether a merger would eliminate a significant competitive force.

language to cover any other transaction occurring in a sector where innovation is an important parameter of competition. Demonstrated by the Illumina/Grail case, the EC takes a firm stance against transactions that raise concerns about innovation, ultimately leading to their prohibition.

In terms of theories of harm, we have witnessed cases where horizontal transactions were affected by the theories of harm linked to innovation competition. However, it is noteworthy that vertical mergers were unusual in such situations. The Illumina/Grail case stands out as the first instance of a vertical merger being examined under a relatively untested 'innovation competition' theory of harm, making it an exceptionally uncommon course of action for the Commission.

3.3.3. The Article 22 Guidance in the Digital Market

(i) Problems in the Article 22 Guidance

In the realm of the European Union Merger Regulation, Article 22 has taken on a novel approach aimed at reshaping the landscape of mergers, with a particular emphasis on curbing killer acquisitions. This approach encourages national authorities to refer mergers to the European Commission for scrutiny, even if they don't meet the standard national merger control criteria.[163] However, the application of Article 22 within the EUMR has stirred up substantial controversies, particularly within the digital market sector. These changes have raised concerns among businesses operating in these markets.

The Guidance's failure to provide clear and objective criteria for identifying transactions subject to notification creates a significant challenge for companies trying to assess their risk of the EC review.[164] The encouragement of voluntary information sharing, coupled with the lack of clear guidelines on what constitutes 'sufficient information', introduces bureaucracy and

[163] Guidance on article 22 EUMR (n 28).
[164] Ibid 11.

uncertainty, particularly impacting digital platforms.[165] The European Commission has power to review completed transactions within six months of closure. This can extend if transaction details weren't publicly known in the EU. The EC has discretion in these cases. If there's potential harm to consumers or a significant threat to competition, the EC can accept referrals even after the six-month period. The uncertainty surrounding this extended review period can lead to unpredictability in post-merger scenarios, potentially undermining confidence in the completion of transactions.[166]

In conclusion, the reinterpretation of Article 22 EUMR within the digital market context is causing widespread concern. It raises questions about legal certainty, legitimate expectations, and the efficacy of merger control as it diverges from established principles and introduces uncertainty. Acknowledging the urgency nature of this matter, the European Union has implemented a new remedy known as the Digital Market Act ('**DMA**').

(ii) Digital Market ACT

The Digital Market Act, effective from November 1, 2022, and enforceable starting May 2, 2023, aims to strengthen the application of Article 22 Guidance and address concerns within the digital market. Its objectives include the effective regulation of issues related to competition, consumer protection, and the responsibilities of digital platforms in the online realm.[167]

Concerning the Article 22 Guidance, which experiences an uncertain extended review period, the DMA establishes an ex-ante requirement for gatekeepers, compelling them to notify the Commission of all planned mergers. This obligation applies irrespective of whether these mergers would typically trigger notification under European or national merger control rules.[168]

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[165] Ibid 11.
[166] Ibid 11.
[167] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265.
[168] Ibid art 14.

Non-compliance with this requirement, whether intentional or negligent, can result in fines of up to 1% of the company's total worldwide turnover from the preceding financial year, with the Commission having a five-year time limit to decide on these fines.[169]

The DMA identifies major tech companies as 'gatekeepers', often referred to as GAFAM companies ('**Google, Apple, Facebook, Amazon, and Microsoft**').[170] These gatekeepers wield significant influence in the internal market, providing core platform services that serve as crucial gateways for business users to reach end-users. They maintain an established and enduring position in their operations or are poised to attain such a position in the near future.[171] These 'core platform services' encompass various online services, including online marketplaces, search engines, social networks, video-sharing platforms, communication services, operating systems, web browsers, virtual assistants, cloud computing, and online advertising.[172]

The DMA also establishes criteria for identifying potential Gatekeepers based on three key presumptions: (i) If an undertaking achieved an annual Union turnover equal to or above €7.5 billion in each of the last three financial years or had a market capitalization of at least €75 billion in the last financial year while offering the same core platform service in at least three Member States, it is presumed to have a significant impact on the internal market,[173] (ii) An undertaking is presumed to provide a core platform service acting as a vital gateway for business users to reach end-users if it had at least 45 million monthly active end-users in the Union and at least 10,000

[169] Ibid art 14.
[170] Markus Porkka, 'Capturing killer acquisitions in the digital sector: Article 102, EU Merger Control and Commission's approach' (Master's thesis, Lund University Faculty of Law 2022) 67.
[171] Ibid 70-71.
[172] Eva Oliveira, 'Preventing Killer Acquisitions in the Digital Sector: The Combination Between Article 22 of the EU Merger Regulation and the Digital Markets Act' 53 (*Concorrencia,* 21 March 2023) < https://www.concorrencia.pt/sites/default/files/documentos/CR50_EvaOliveira_v2.pdf> accessed 10.04.2023.
[173] Sarah Ataei, Jens Van Lathem and Roeland Moeyersons 'New EU rules on digital services and markets will soon come into force', (*Seeds of Law*, 30.04.2023) <https://seeds.law/en/news-insights/new-eu-rules-on-digitalservices-and-markets-will-soon-come-into-force/> accessed 14 September 2023.

yearly active business users in the last financial year[174] (iii) If the undertaking had the same user numbers over the last three financial years, it is presumed to have an entrenched and enduring position, or it is foreseeable that it will achieve such a position in the near future.[175]

According to Bloomberg data, companies like Airbnb, Alphabet (Google), Amazon, Apple, Booking Holdings, Meta (Facebook), Microsoft, Oracle, PayPal, Salesforce, SAP, Uber, and Zoom could potentially become Gatekeepers if they meet the criteria outlined in Article 3 of the DMA.[176]

(iii) Combining the Article 22 Guidance and the Digital Market Act

The new Article 22 Guidance represents a positive step towards preventing killer acquisitions by reinforcing enforcement measures, albeit with some remaining gaps that need attention.[177] The DMA's 'ex-ante requirement' mandates gatekeepers to proactively notify the Commission about all planned mergers, which effectively addresses this ambiguity.[178] Importantly, despite the DMA's ex-ante regulation, the need for ex-post interventions outlined in the Article 22 Guidance persists.[179]

Thus, Article 14 DMA allows us to detect potential competition-related concerns in advance, while Article 22 Guidance remains a valuable tool for assessing completed mergers. The synergy between Article 14 DMA and Article 22 EUMR enhances the Commission's and EU member states' capacity to identify problematic mergers eligible for referral to the Commission's review process.[180]

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[174] Bojana Bellamy and Aaron Simpson, 'EU Digital Markets Act: Key Aspects and Lingering Questions' (*CPO Magazine*, 7 June 2022)<https://www.cpomagazine.com/data-protection/eu-digital-markets-act-key-aspectsand-lingering-questions/> accessed 14 September 2023.
[175] Oliveira (n 172) 52-53.
[176] Ibid 53.
[177] Oliveira (n 172).
[178] Ibid.
[179] Ibid.
[180] Carugati (n 49).

This collaborative effort between the Commission and national competition authorities, facilitated by the revised Article 22 and the DMA, is expected to substantially reduce potential killer acquisitions, fostering competition in digital markets, and expanding consumer choices.[181]

(iv) Recent Cases in the Digital Market

UK CMA in Meta/Giphy

Meta, formerly known as Facebook, stands as a multinational technology powerhouse renowned for its ownership and operation of diverse social media platforms, such as Facebook, Instagram, WhatsApp, and Oculus.[182] One of its key distinguishing features is its strategic approach to acquisitions, aimed at enriching its services and broadening its array of offerings to users.

Giphy functions as an internet repository and search engine for GIFs, making it a widely-used platform where users can discover and distribute animated images to convey emotions, reactions, and humor across various social media platforms and messaging applications.[183] It offers a vast library of GIFs covering a wide range of topics, making it an integral part of online communication.[184] Giphy derives its revenue from advertisers, whereas Facebook generates revenue primarily through display advertising and boasts a vast global user base.[185] Additionally, it's worth noting that Giphy had no sales in the United Kingdom.[186]

On May 15, 2020, Facebook successfully finalized its acquisition of Giphy at an approximate cost of US$315 million.[187] This acquisition caught the attention of regulatory bodies,

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[181] Porkka (n 170) 71.
[182] Competition & Markets Authority, 'Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of Giphy, Inc. Final report on the case remitted to the CMA by the Competition Appeal Tribunal' (CMA 2022) para 2.17.
[183] Ibid.
[184] Ibid paras 2.1-2.15.
[185] Kiran Desai, 'Facebook/GIPHY Merger - The End of Big Tech's Spending Spree?' (2022) 6 Eur Competition & Reg L Rev 85, 85-86.
[186] Jennifer PM Marsh and others, 'CMA Blocks Meta/Giphy – It Might Be the Meta Universe But We're Living in the CMA's World) (*K&L Gates*, 2 November 2022) <https://www.klgates.com/CMA-Blocks-Meta/Giphy-It-Might-Be-the-Meta-Universe-but-Were-Living-in-the-CMAs-World-11-2-2022> Accessed 15.04.2023.
[187] Ibid.

including the UK's Competition and Markets Authority, which subsequently initiated an investigation into the potential impact of this acquisition on competition within the digital advertising and social media markets.[188] As Giphy did not generate any revenue in the United Kingdom, Meta proceeded with the acquisition without proactively notifying the CMA for examination.[189]

The core concern revolves around whether Facebook's acquisition of Giphy would result in diminished competition and potential antitrust violations in the digital advertising market, thereby necessitating the divestiture of Giphy. This issue encompasses an evaluation of competition in relevant markets, potential harms, and the need to address them, with a particular focus on social media and display advertising. Eventually, the UK's Competition and Markets Authority did not approve the transaction and ordered Facebook to sell Giphy, a GIF website.[190]

The CMA, following its Merger Assessment Guidelines, conducted a thorough assessment of the case, considering factors such as potential competition, entry barriers, and market power.[191] Their findings pointed to a significant reduction in competition, particularly in terms of dynamic competition and the potential denial of access to Giphy's services by rival social media platforms. These findings indicated that the acquisition was adversely affecting both social media users and advertisers in the UK.[192] Specifically, the CMA concluded that the acquisition would substantially lessen competition in the relevant markets, particularly with regards to the decreased competition between social media platforms and the removal of Giphy as a potential threat in the display

[188] Congressional Research Service, 'Facebook's Acquisition of GIPHY: Potential Competition Issues' (*CRS Reports IN11411*, 6 April 2021),2 <https://crsreports.congress.gov/product/pdf/IN/IN11411>.
[189] Marsh (n 186).
[190] CompetUtUon and Markets AuthorUty, 'The CMA requires Facebook (which has recently renamed itself 'Meta') to sell Giphy, after finding that the deal could harm social media users and UK advertisers.' (30 November 2021) <https://www.gov.uk/government/news/cma-dUrects-facebook-to-sell-gUphy> accessed 18.04.2023.
[191] Marsh (n 186).
[192] The CMA requires Facebook (which has recently renamed itself 'Meta') to sell Giphy, after finding that the deal could harm social media users and UK advertisers.' (n 190).

advertising market.[193]

One notable concern highlighted by the CMA was the loss of dynamic competition, especially in the social media and digital advertising sectors. Dynamic competition, driven by innovation, emerging market players, and evolving market dynamics, was deemed essential for consumer benefit and market innovation. The acquisition raised fears that such dynamic competition could be stifled, resulting in detrimental consequences for consumers and market innovation.[194]

In addition to these findings, the CMA identified another theory of harm related to the potential foreclosure of access to Giphy's services by rival social media platforms. In essence, this theory indicates harm to potential competition, as it could lead to other social media platforms being denied access to Giphy's GIFs and services, ultimately limiting choice and competition within the market. [195]

The CMA believes that selling Giphy is crucial to protect millions of social media users and promote competition and innovation in digital advertising.[196] This divestiture, addressing concerns about dynamic competition and potential access denial, aims to create a more diverse and competitive tech industry.

Appeal of the Decision

Meta appealed against the CMA's decision with the Competition Appeal Tribunal ('**CAT**'). In July 2022, the CAT had no objections reservations in confirming the CMA's finding

[193] Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of Giphy, Inc. Final report on the case remitted to the CMA by the Competition Appeal Tribunal (n 182).
[194] Desai (n 185) 87-88.
[195] Ibid 88-89.
[196] Bharat Sharma, 'UK Wants Facebook To Sell Off Popular GIF-Making Website 'Giphy': Here's Why' (*Technology*, 2 December 2021) <https://www.indiatimes.com/technology/news/uk-facebook-giphy-sale-555708.html> accessed 13 September 2021.

that the merger significantly diminished dynamic competition, deeming it legally sound.[197]

Meta, responding to the CMA's reissued decision on October 19, 2022, issued a statement acknowledging the CMA's final verdict. They also reaffirmed their dedication to collaborating closely with the CMA for the smooth divestiture of GIPHY.[198] Consequently, Facebook found itself obliged to sell GIPHY, incurring a significant loss of more than $260 million (£210 million). They were constrained to finalize the sale for a mere $53 million due to regulatory hurdles.[199]

The CMA believes that selling Giphy is crucial to protect millions of social media users and promote competition and innovation in digital advertising. This divestiture, addressing concerns about dynamic competition and potential access denial, aims to create a more diverse and competitive technology industry.[200]

Observations

This case stands as one of the initial instances of what is often referred to as a 'killer acquisition' in the technology sector, signifying a shift in the landscape of competition law. This shift is marked by an increasing focus on dynamic competition and its far-reaching impact on both innovation and the welfare of consumers.[201]

The CMA's decision in this case sends a strong signal about its heightened willingness to thoroughly scrutinize and potentially block acquisitions by Big Tech firms if they pose a threat to

[197] Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of Giphy, Inc. Final report on the case remitted to the CMA by the Competition Appeal Tribunal (n 182) 7.
[198] Jennifer Marsh, Anna Sikora and Niall Lavery, 'CMA Blocks Meta/Giphy: Is the UK Regulator the Most Aggressive on Big Tech Merger Control?' (*Competition Law Insight*, 18 January 2023) <https://www.competitionlawinsight.com/competition-issues/cma-blocks-metagiphy-152942.htm> accessed 21.04.2023.
[199] Alex Hern, 'Facebook owner Meta sells Giphy at a loss of more than $260m' (*The Guardian*, 23 May 2023)<https://www.theguardian.com/technology/2023/may/23/facebook-owner-meta-sells-giphy-shutterstock-gifsearch#:~:text=The%20owner%20of%20Facebook%20has,deal%20was%20blocked%20by%20regulators.%20>accessed 11 September 2023.
[200] Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of Giphy, Inc. Final report on the case remitted to the CMA by the Competition Appeal Tribunal (n 182) 245.
[201] Desai (n 185) 87-89.

competition. This reflects a renewed commitment to meticulously assessing digital deals and safeguarding competition, especially against potential challenges in the future. The outcome of Facebook's appeal in this matter sets a precedent and has significant ramifications for the evaluation of dynamic competition in future technology mergers.

The acquisition of Giphy by Facebook not only has the potential to provide Facebook with access to a substantial amount of user data and improve its digital advertising capabilities but also raises notable concerns about competition in the digital advertising market. As evidence, the suspension of GIPHY's advertising services by Facebook raised concerns, particularly in light of Facebook's dominant market position in the UK's social media and display advertising sectors.[202]

Furthermore, this ruling highlights the critical need for dealmakers to proactively account for the UK's regulatory framework at an early stage of their due diligence, even if their target company primarily conducts business elsewhere. The UK's merger control and National Security and Investment Act regulations can present formidable challenges, particularly for transactions in innovative sectors.[203]

Microsoft/Activision

Microsoft Corp. stands as a prominent global powerhouse in the technology industry, excelling in various domains such as software, services, devices, and solutions. They offer various products like applications, software, devices, and video games, including the X-box gaming console.[204] In 2022, they had over $100 billion in cash and generated over $200 billion in revenue

[202] Mark Sweney, 'Facebook Owner Meta to Sell Giphy After UK Watchdog Confirms Ruling' (*The Guardian*, 18 October 2022) < https://www.theguardian.com/technology/2022/oct/18/facebook-meta-sell-giphycma> Accessed 30.04.2023.
[203] Tom Smith, 'CMA Blocks the Facebook/Giphy Merger: You Can't Say They Didn't Warn Us' (*The Platform Law Blog*, 7 December 2021) <https://theplatformlaw.blog/2021/12/07/cma-blocks-the-facebook-giphymerger-you-cant-say-they-didnt-warn-us/> Accessed 01.05.2023.
[204] Jie Hu and Chenyuan Wu, 'Microsoft's Acquisition of Activision Blizzard: A Case Study' (2023) 7 Highlights in Business Economics and Management 363, 363.

and they have quickly became the largest PC software company in the world.[205]

Their most well-known product is the Windows operating system, which has dominated the computer industry for a long time. However, as the popularity of tablets and smartphones grew and PCs declined, Microsoft shifted its focus to cloud computing with a new business model.[206] Cloud game streaming is a new trend in the gaming industry where games are played remotely on different devices without needing to be downloaded, allowing gamers to play on any device, even those that wouldn't typically support the game, but it currently makes up a small portion of the game distribution market and needs more games and fast internet to reach its full potential.[207]

On the other hand, Activision Blizzard is an American gaming giant renowned for its popular franchises like Call of Duty, Candy Crush, and World of Warcraft,[208] stands as one of the world's largest video game publishers, with annual revenues reaching approximately $8.8 billion in 2021.[209]

In the world of gaming, both corporations are actively involved in the development, publishing, and distribution of games across a wide spectrum of platforms, spanning PC, console, and mobile. Hence, if Microsoft acquire Activision, it would rank as the third-largest gaming company in terms of revenue, trailing only behind Tencent and Sony.[210]

In January 2022, Microsoft announced its intention to acquire Activision for a substantial

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[205] Jordan Novet, 'The biggest takeaways from Microsoft's courtroom showdown with the FTC over Activision Blizzard' (*CNBC*, 30 June 2023)< https://www.cnbc.com/2023/06/30/microsoft-activision-showdownwith-ftcbiggesttakeaways.html#:~:text=Microsoft%20had%20%24104%20billion%20in,generation%2C%20which%20debuted%20in%202020.%20> accessed 11 September 2023.

[206] European Commission, 'Mergers: Commission clears acquisition of Activision Blizzard by Microsoft, subject to conditions' (2023)<https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2705> accessed 02.05.2023.

[207] Ibid.

[208] Ibid.

[209] Activision Blizzard Corporation, Annual Report (2021), 38.

[210] Ishita Bora, 'Microsoft Acquires Activision Blizzard For $69B To Ramp Up Its Gaming And Metaverse Plans' (*Crypto News Point*, 22 January 2022) <https://www.cryptonewspoint.com/post/microsoft-acquiresactivision-blizzard-for-69b-to-ramp-up-its-gaming-and-metaverse-plans> accessed 13 September 2023.

sum of $69 billion.[211] However, this ambitious move has sparked intense opposition from various quarters, most notably from Sony, the driving force behind PlayStation. This dynamic rivalry sets the stage for a head-to-head competition between PlayStation and Xbox—entities owned by Sony and Microsoft, respectively.[212] Sony is deeply concerned that Microsoft may enforce restrictions on specific games available on PlayStation and other platforms, with the aim of amplifying revenue through Xbox post-Activision acquisition. Sony contends that such exclusivity, especially for popular titles like Call of Duty, could severely curtail its ability to compete, diminishing options for gamers and developers. To further substantiate this claim, Google alleged that Microsoft intentionally undermined the quality of its Game Pass subscription service when accessed through Google's Chrome operating system.[213]

However, while facing objections in the UK and the US, Microsoft's acquisition of Activision secured green light from the European Commission in accordance with the EU Merger Regulation, albeit with certain mandated conditions.[214] Following a detailed market investigation, the Commission found that Microsoft wouldn't harm rival consoles and multi-game subscription services. However, it could still impede competition in cloud game streaming services and bolster its position in the PC operating systems market.[215]

Theory of harm in console gaming:

The EU Commission's assessment of Microsoft's acquisition of Activision reveals that it is unlikely to disrupt competition in the console market, primarily due to Sony's dominant

[211] Ashna Mahajan, 'Microsoft-Activision Merger' (*Denny Center,* 2023),1 <https://www.law.georgetown.edu/denny-center/wpcontent/uploads/sites/41/2023/05/MicrosoftActivisionMerger_FINAL.pdf> accessed 30.08.2023.
[212] Rohan Goswami and Jordan Novet, 'Microsoft and Sony sign deal to keep Activision's Call of Duty on PlayStation'(*CNBC,* 16 July 2023) < https://www.cnbc.com/2023/07/16/microsoft-and-sony-sign-deal-to-keepactivisions-call-of-duty-on-playstation.html#%20> accessed 04.08.2023.
[213] Mahajan (n 211) 1.
[214] Mergers: Commission clears acquisition of Activision Blizzard by Microsoft, subject to conditions' (n 206).
[215] Ibid.

position.[216] This is further supported by the fact that Microsoft is unlikely to withhold Activision's games from Sony, given Sony's global leadership in console game distribution and significant presence in the EEA, where Sony outsells Microsoft four-to-one in terms of PlayStation consoles.[217] Thus, even if Microsoft were to remove Activision's games from PlayStation, it is unlikely to significantly impact competition in the console market.[218] Additionally, before the acquisition, Activision had no plans to offer its games through multi-game subscription services, aimed at protecting individual game sales. Consequently, third-party providers of such services are unlikely to be affected following Microsoft's acquisition of Activision.[219]

Theory of harm in cloud gaming:

Microsoft's initial position lagging behind Sony's PlayStation and Nintendo Switch prompted their introduction of cloud gaming, a focal point in the EU's investigation.[220] To begin with, regulators in the EU have determined that Microsoft's acquisition could have adverse effects on competition in the distribution of PC and console games via cloud gaming services.[221] Granting exclusivity to Activision games on its own platform could bolster Windows' position in the PC operating systems market by potentially impeding or degrading game streaming on non-Windows systems.[222]

Another noteworthy concern relates to the innovative domain of cloud game streaming,

[216] Tom Warren, 'Microsoft's Activision Blizzard acquisition approved by EU regulators/Europe clears Microsoft's giant $68.7 billion deal.' (*The Verge,* 15 May 2023) <https://www.theverge.com/2023/5/15/23723703/microsoft-activision-blizzard-acquisition-approved-eu-europeancommission>accessed 17.05.2023.
[217] European Commission, 'Mergers: Commission clears acquisition of Activision Blizzard by Microsoft, subject to conditions' (n 206).
[218] Ibid.
[219] Ibid.
[220] Arjun Kharpal, 'EU Approves Microsoft's $69 Billion Acquisition of Activision Blizzard, Clearing Huge Hurdle' (CNBC: Tech, 15 May 2023) < https://www.cnbc.com/2023/05/15/microsoftactivision-deal-eu-approves-takeover-of-call-of-duty-maker.html> Accessed 05.08.2023.
[221] Warren, 15 May 2023 (n 216).
[222] Mergers: Commission clears acquisition of Activision Blizzard by Microsoft, subject to conditions' (n 206).

poised to revolutionize the gaming landscape. Presently, cloud game streaming faces limitations, but the Commission recognized Activision's popular games as catalysts for sector expansion. However, if Microsoft limits access to Activision's games through Game Pass Ultimate, it might harm competition in cloud game streaming.[223]

Commitments made by Microsoft:

In response to these concerns, Microsoft presented a set of comprehensive licensing commitments designed to address competition issues, with a duration of 10 years.[224] These commitments include:

- Free licenses for cloud providers operating in EU markets to stream Activision games, promoting accessibility and competition in the gaming industry.[225] This empowers gamers to stream their games on their preferred platforms, regardless of their initial purchase location.

- Complimentary licenses for consumers in EU countries, allowing them to stream all licensed Activision Blizzard PC and console games using their preferred cloud game streaming service.[226]

Following a comprehensive investigation, the Commission gathered input from market participants and stakeholders to evaluate the effectiveness of these remedies. Cloud game streaming service providers responded positively and showed interest in obtaining these licenses. Some providers have already made agreements with Microsoft based on these licenses to stream Activision's games after the transaction's completion.[227] Taking this market feedback into account, the Commission concluded that the proposed acquisition, along with these commitments, would

[223] Ibid.
[224] Ibid.
[225] Ibid.
[226] Ibid.
[227] Ibid.

no longer raise competition concerns. Instead, it is expected to yield significant benefits for both competition and consumers. The Commission's decision is contingent upon full compliance with these commitments, monitored by an independent trustee appointed by the Commission.[228]

The other countries:

The EU granted approval for the deal after Microsoft committed to ensuring that gamers can access Activision titles on competing cloud gaming services for a decade. China granted unconditional approval, and several other countries, including South Africa, Japan, Chile, Brazil, and Saudi Arabia, also gave their green light.[229]

In contrast, the US and the UK presented challenges to the deal's approval, citing concerns about its potential impact on competition, which led to intensive antitrust regulatory scrutiny in these regions.[230]

The U.S

In the US, the Appeals Court ultimately approved the transaction and rejected the Federal Trade Commission's ('**FTC**') request to halt Microsoft's $69 billion acquisition of Activision Blizzard.[231] The court determined that the FTC's claim of potential harm to competition was unlikely to succeed, resulting in the denial of the motion for a preliminary injunction.[232] The court also considered Microsoft's commitments to maintaining Call of Duty on PlayStation and ensuring its availability on other platforms during its deliberations.[233] Furthermore, Microsoft needed

[228] Ibid.
[229] Luke Alpin, 'Microsoft – Activision Deal Divides Regulators' (*Global Finance Magazine*, 5 June 2023) <https://www.gfmag.com/magazine/june-2023/acquisitions-microsoft-activision-deal> Accessed 06.06.2023.
[230] Mahajan (n 211) 3.
[231] Guardian staff and agencies, 'US agency loses bid to halt Microsoft's $69bn purchase of Activision Blizzard' (*The Guardian*, 15 July 2023) < https://www.theguardian.com/technology/2023/jul/14/microsoftactivision-blizzard-deal-us-court-ruling-ftc> accessed 11.08.2023.
[232] Tom Warren, 'Microsoft wins FTC fight to buy Activision Blizzard' (*The Verge*, 11 July 2023) <https://www.theverge.com/2023/7/11/23779039/microsoft-activision-blizzard-ftc-trial-win > accessed 11.08.2023.
[233] Ibid.

approval from the CMA to proceed with the deal; otherwise, its gaming division would have had to exit the UK market or discontinue cloud gaming services in the country. This decision clears the way for Microsoft to move forward with the deal and expand its gaming business.

The UK

The UK's antitrust regulator maintained its decision to block the $68.7 billion Microsoft/Activision gaming merger, despite Microsoft's efforts to reverse this decision based on subsequent developments. Simultaneously, the Competition and Markets Authority has initiated a new investigation into Microsoft's revised proposal for review.[234] The British regulatory body expressed concerns about Microsoft potentially attaining a dominant position in the emerging field of cloud gaming before its official launch.[235]

The CMA in the UK determined that Microsoft could potentially withhold games from Sony's PlayStation while continuing to support games from Activision,[236] which could lead to reduced innovation and limited options for gamers in the UK in the future.[237] This situation raises concerns because Microsoft's Windows platform, along with its substantial cloud infrastructure, could provide the company with an unfair competitive advantage.[238]

Theory of harm in console gaming:

The UK CMA's assessment is that the Merger is unlikely to significantly diminish

[234] Natasha Lomas, 'UK's CMA confirms decision to block Microsoft-Activision but opens fresh probe of restructured deal proposal' (*TechCrunch,* 22 August 2023) < https://techcrunch.com/2023/08/22/microsoftactivision-uk-cma-newprobe/?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAALhwcAzu8l6YzFqjOY6Ww1ivmSIi3ksTrN1qvxWPPCMIjFxeDNKcma4dvCSdGYfIpc5v0rciV6O0caa0k09m30QeHmCGy-NYvBPTQYVqo8AjcMRk9J1SFb4DDrR4YApTk35bD4fptJzlvdfw_xBGkAhQ3jahtQCnPXQl58dpAhE> accessed 25.08.2023.
[235] Mahajan (n 211) 3.
[236] Paul Sawers, 'Europe greenlights Microsoft's $68.7B Activision acquisition' (*TechCrunch,* 15 May 2023) < https://techcrunch.com/2023/05/15/europe-greenlights-microsofts-68-7b-activision-acquisition/> accessed 18.05.2023.
[237] Warren, 11 July 2023 (n 232).
[238] Ibid.

competition in the UK's console gaming services market.[239]

Theory of harm in cloud gaming:

The CMA in the UK evaluated the competitive landscape in the cloud gaming services market and assessed the prospective effects of the merger on competition. At present, Microsoft commands a significant portion, estimated to be between 60% and 70%, of the worldwide cloud gaming services market.[240] Additionally, Microsoft possesses other key advantages in cloud gaming, including ownership of Xbox, the popular PC operating system (Windows), and a robust global cloud computing infrastructure (Azure and Xbox Cloud Gaming).[241] The merger would strengthen Microsoft's market dominance by giving it control over critical gaming content such as Call of Duty, Overwatch, and World of Warcraft.[242] The CMA demonstrated that Microsoft would have a strong incentive to make Activision's games exclusive to its own cloud gaming service for commercial gain.[243] It's crucial to note that not all competitors need to be eliminated for competition to suffer, and other rivals may also face challenges, making it harder for newcomers and smaller players to enter the video game market.[244]

Consequently, the merger is likely to significantly reduce competition in the UK's cloud gaming service market. The agreements with NVIDIA, Boosteroid, and Ubitus don't appear to significantly change the merged entity's incentives to stifle competitors.[245] According to the UK regulator, the agreements would change the trajectory of the rapidly expanding cloud gaming

[239] Competition & Markets Authority, 'Anticipated acquisition by Microsoft of Activision Blizzard, Inc. Final report' (CMA, 26 April 2023) 191.
[240] Competition and Markets Authority, 'Microsoft / Activision deal prevented to protect innovation and choice in cloud gaming' (2023) <https://www.gov.uk/government/news/microsoft-activision-deal-prevented-toprotect-innovation-and-choice-in-cloud-gaming> accessed 09.09.2023.
[241] Anticipated acquisition by Microsoft of Activision Blizzard, Inc. Final report (n 239) 4.
[242] Microsoft / Activision deal prevented to protect innovation and choice in cloud gaming (n 240).
[243] Ibid.
[244] Anticipated acquisition by Microsoft of Activision Blizzard, Inc. Final report (n 239) 303.
[245] Ibid 303-304.

industry, potentially resulting in diminished innovation and a narrower range of options for gamers in the UK in the years ahead.[246] The evaluation also underscores the unique value of Activision's content in the cloud gaming service market, impacting competitors' competitiveness and potentially diminishing both current and future competition.[247]

Assessment of the Commitments

Despite this, the CMA in the UK argued that Microsoft's proposals might not adequately replace the current 'competitive dynamism'. The reason being, the proposed arrangements heavily rely on Microsoft's own decisions and regulatory supervision, which the CMA finds concerning.[248]

The CMA identified several shortcomings in Microsoft's proposal related to the evolving nature of cloud gaming services, including insufficient coverage of various cloud gaming service models, limited openness to providers interested in offering game versions on non-Windows PC operating systems, and standardization of terms and conditions for game availability, potentially stifling dynamism, and creative competition.[249]

The CMA is concerned that the purchase may result in a significant reduction in competition, especially within the cloud gaming services sector. This harm relates to the potential reduction in competition in the market due to Microsoft's increased dominance.

Similar to the META/GIPHY case, the CMA is concerned about the loss of dynamic competition. Dynamic competition refers to competition driven by innovation, new entrants, and evolving market dynamics. The CMA believes that the acquisition could stifle such dynamic competition, which could have negative effects on consumers and market innovation.

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[246] Ibid 371-372.
[247] Ibid 303-304
[248] Paul Sawers, 'Europe greenlights Microsoft's $68.7B Activision acquisition' (TechCrunch, 15 May 2023) < https://techcrunch.com/2023/05/15/europe-greenlights-microsofts-68-7b-activisionacquisition/> accessed 18.05.2023.
[249] Microsoft / Activision deal prevented to protect innovation and choice in cloud gaming (n 240)

Another concern is that Microsoft, after acquiring Activision, could potentially make Activision's games exclusive to its own platforms, including its cloud gaming service. This could lead to foreclosure, where rival gaming platforms are denied access to popular game titles, limiting choice and competition in the market.

The CMA is examining Microsoft's market dominance, especially in the global cloud gaming services market, which could be strengthened further through the acquisition. Market dominance can lead to unfair competitive advantages and limited competition.

Briefly, the CMA believed that preventing the merger would effectively address the issues in the UK's cloud gaming service market and its potential negative impacts.[250] The regulator expressed particular concern about the impact of the agreement on the future of the fast-growing cloud gaming market, potentially leading to reduced innovation and a more limited array of choices for gamers in the UK.

Recent updates

The CMA was the final regulator standing in the way of Microsoft's $68.7 billion deal with Activision Blizzard. Both Microsoft and the Competition and Markets Authority have requested a pause in the proceedings before the Competition Appeal Tribunal to work on new proposals that address CMA's concerns.[251] This pause comes after Microsoft won a separate ruling against the FTC in the US.[252]

Ultimately, on 13 October 2023, the CMA granted Microsoft consent to acquire Activision Blizzard, Inc., except for Activision's cloud streaming rights outside the EEA. This consent is

[250] Anticipated acquisition by Microsoft of Activision Blizzard, Inc. Final report (n 239) 415.
[251] James Batchelor, 'Microsoft's UK appeal for Activision buy paused for two months' (*Games Industry.biz* 18 July 2023) <https://www.gamesindustry.biz/microsofts-uk-appeal-for-activision-buy-paused-for-twomonths>accessed 05.08.2023.
[252] Ibid.

subject to the condition that the sale of Activision's cloud streaming rights happens before the merger, which is in line with the CMA's Final Order that initially blocked Microsoft's full acquisition of Activision.[253]

Observations

The Microsoft/Activision case represents a notable turning point in the continuously evolving global gaming industry and carries significant implications as it sets a precedent for future tech industry mergers and acquisitions. It represents an early example of a 'killer acquisition' in the digital market, signifying the potential to stifle innovation and consolidate market dominance.

While various global authorities, including the EU and the USA, have approved the merger, the meticulous examination by the CMA underscored valid concerns. These concerns primarily revolve around potential adverse effects on competition, stifling emerging competitors, and hindering innovation in the industry.

In my view, the primary aim of this merger is to bolster Microsoft's competitiveness in the game console market. By acquiring Activision Blizzard, Microsoft seeks to overcome organizational challenges within its own game development branch, Xbox Game Studios, and rapidly compete with Sony. This can be viewed as a strategic partnership benefiting both parties. It allows Microsoft to expand its audience, enter the gaming market with exclusive IP, and boost game sales, with a potential focus on the metaverse segment and further acquisitions in the gaming industry.[254] Thus, allowing this merger to proceed may result in reduced innovation, aligning with the CMA's apprehensions regarding Microsoft's impact on cloud gaming's competitive landscape

[253] Competition and Markets Authority, 'Anticipated acquisition by Microsoft Corporation of Activision Blizzard (excluding Activision Blizzard's non-EEA cloud streaming rights' (13 October 2023) < https://assets.publUshUng.servUce.gov.uk/medUa/652864062548ca000dddf22d/Full_text_decUsUon__fUnal_order_.pdf>accessed 17.10.2023.

[254] Dirk Auer, 'Killer Acquisition or Leveling Up: The Use of Mergers to Enter Adjacent Markets' (*The Truth on the Market*, 01 February 2023) < https://truthonthemarket.com/2023/02/01/killer-acquisition-or-levelingup-the-use-of-mergers-to-enter-adjacent-markets/> accessed 06.08.2023.

and innovation.

The CMA emphasized the importance of maintaining a free, competitive market to foster innovation and choice in this rapidly evolving sector. However, they have eventually approved Microsoft's acquisition of Activision, without the cloud gaming rights. According to the CMA, this decision prevents Microsoft from monopolizing the cloud gaming market, ensuring competitive pricing and services for UK cloud gaming customers.

While there are those who endorse the merger, arguing that the commitments offered adequately address competition concerns, the overall impact remains a subject of scrutiny and debate. Microsoft's strategic goal with this acquisition is to enhance Activision's presence in the mobile gaming sphere, introduce cross-device play, and expand its streaming service.[255]

Meta/Kustomer

Reflecting current trends, the European Commission evaluated mergers with digital implications in 2021, as illustrated by the thorough investigation into Meta's proposed acquisition of Kustomer, a Customer Relationship Management ('**CRM**') software.[256] Kustomer, a relatively small player, is known for its innovation in the customer service and support CRM software market, while Meta operates popular messaging platforms like WhatsApp, Instagram, and Messenger. The Commission carried out a thorough inquiry to assess the possible effects of the acquisition on competition in relevant markets.[257]

On 2 August 2021, the Commission collected substantial information and feedback from competitors and customers, working closely with competition authorities worldwide.[258] Initially,

[255] Mahajan (n 211) 3.
[256] Case M.10262 *Meta (formerly Facebook)/Kustomer* [2022] OJ C417.
[257] European Commission, 'Mergers: Commission clears acquisition of Kustomer by Meta (formerly Facebook), subject to conditions' (2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_652>accessed 02.09.2023.
[258] *Meta (formerly Facebook)/Kustomer Monsanto* (n 256).

the Commission expressed concerns regarding potential competition issues in the CRM software and customer service CRM software markets.[259]

The Commission's findings revealed that Meta could potentially employ strategies detrimental to competition, such as restricting access to its messaging channels for rival firms. However, concerns related to the supply of online display advertising services were deemed not significant and also the additional data access Meta might obtain from Kustomer's customers would not substantially harm competition in the online display advertising services sector.[260]

Ultimately, the Commission granted approval for the acquisition, contingent on the precise conditions specified within Meta's access commitments. The Commission's assessment of the Final Commitments indicates their efficacy in addressing competition concerns. The 10-year duration mitigates worries raised in the market test and by a Member State, aligning with divestitures in impact. Key commitments include providing free access to public APIs, ensuring a comprehensive list of core functionalities with a mechanism for future additions, reducing beta testing risks, covering public comment responses on Facebook and Instagram, expanding the definition of Third Party CS CRM Providers, committing not to change Terms of Service to circumvent, and adding an EEA-based arbitration venue. These commitments are seen as implementable promptly and proportionate to the identified competition concerns.[261]

A designated trustee will be overseeing the proper implementation of these commitments, ensuring compliance. The Commission's decision remains contingent on Meta's full adherence to these commitments.[262]

[259] Ibid.
[260] Ibid.
[261] Ibid 684-693.
[262] Ibid.

Observations

The European Commission's decision to scrutinize the Meta/Kustomer acquisition underscores the pivotal role of competition within digital markets. It emphasizes that even smaller players like Kustomer, contributing to innovation and competition, face regulatory examination when acquired by tech giants such as Meta. This ensures that innovative rivals and new entrants have a fair chance to compete, highlighting regulators' delicate balance between fostering innovation and preventing market dominance by established companies.

Furthermore, this case underscores the significance of analyzing vertical market integration in merger reviews. Meta's control over messaging channels and Kustomer's CRM software created vertically related markets that warranted thorough scrutiny.

The Commission's examination of data access and online advertising reflects the evolving nature of competition concerns in digital markets. Recognizing that access and control of data are central to understanding market dynamics, the Commission's approach involves practical measures. These include using access commitments as remedies, appointing a trustee, and implementing dispute resolution mechanisms. This approach addresses competition concerns while allowing the merger to proceed with specific conditions.

Collaboration with competition authorities from various countries highlights the global nature of mergers and acquisitions in the digital age. It emphasizes the significance of international cooperation in addressing competition issues.

This case also reveals that regulatory scrutiny can extend beyond traditional turnover thresholds when competition concerns arise, showcasing the evolving landscape of merger control rules.

The requirement for Meta to disclose information on relevant Application Programming Interfaces (‘**APIs**’) and functionalities, coupled with regular reporting, emphasizes the

Commission's commitment to transparency and accountability in ensuring compliance with commitments.

Moreover, the Commission's focus on potential negative impacts on business customers and Small to Medium-sized Businesses ('**SMBs**'), with the potential to affect consumers, reflects a comprehensive perspective on competition that considers both business and consumer interests.

In essence, this case highlights the regulatory adaptability necessary to address competition issues stemming from technological advancements and changing market dynamics. Such adaptability is crucial for safeguarding fair competition in the digital era.

Google/Fitbit

Google operates in various domains, with a strong presence in online advertising, especially in search advertising, which appears when users search on search engines. Google also controls Android, the operating system used in most smartphones, excluding iPhones.[263] However, although Google has explored wearables like Google Glass, it has not been involved in selling fitness trackers or smartwatches.

Fitbit, an American company, specializes in designing and distributing wearable devices, including smartwatches, fitness trackers, and connected scales within the health and wellness sector.[264] Fitbit also provides associated software and services to complement its hardware offerings.[265] Nevertheless, it holds a limited market share in Europe within the rapidly expanding smartwatch sector, where it faces stiff competition from prominent players like Apple, Garmin,

[263] SUmon Vande Walle, 'The European CommUssUon's Approval of Google / FUtbUt – A Case Note and Comment' (CONCURRENCES COMPETITION LAW REVIEW Nr. 3-2021, 2021)1, 3 <https://ssrn.com/abstract=3893079 or http://dx.doU.org/10.2139/ssrn.3893079> accessed 5 September 2023.
[264] Ibid 2.
[265] European Commission, 'Mergers: Commission clears acquisition of Fitbit by Google, subject to conditions' (2020)< https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2484 accessed 05.09.2023.

and Samsung.[266]

In November 2019, Google publicly announced its intention to acquire Fitbit for $2.1 billion.[267] The notification of the deal to the European Commission occurred in June 2020, leading to the initiation of a comprehensive Phase II investigation.

According to the EC's press release: (i) The Commission concluded that acquiring Fitbit would give Google access to a wealth of user data, such as step counts, heart rates, and sleep patterns, bolstering its ability to deliver personalized ads. This could stifle competition in search and display advertising, resulting in higher entry barriers, potential price impacts, and limited choices for advertisers.[268] (ii) Google's post-acquisition control over Fitbit's data might limit competitors' access, especially affecting European healthcare startups.[269] (iii) There were concerns that Google might weaken compatibility between Android smartphones and rival wrist-worn device makers after the acquisition.[270] (iv) Some worried that Google, already strong in digital healthcare, might gain an overwhelming edge through the merger. However, the Commission's investigation found this unlikely due to the nascent European healthcare sector and Fitbit's smaller smartwatch user base.[271] (v) On the other hand, while Fitbit had its privacy shortcomings, the acquisition raised concerns about data control. The Commission's approach aligns with its stance in previous cases like Facebook/WhatsApp, treating privacy concerns as outside the scope of competition law. Critics argue for a more holistic approach, integrating data protection into competition analysis, citing potential exploitation and discrimination of users with Google's access to Fitbit data. However, the Commission found no evidence of such plans and emphasized

[266] Ibid.
[267] Ibid.
[268] Ibid.
[269] Ibid.
[270] Ibid.
[271] Ibid.

consumer choice in alternatives other than Fitbit.[272]

Briefly, the case has sparked significant concerns about Google potentially gaining undue advantages in online advertising and further strengthening its dominance in the digital health sector, with potential implications for privacy and competition.[273] To address these concerns, Google proposed remedies during the initial phase.[274]

Eventually, the European Commission has granted approval for Google's acquisition of Fitbit, contingent upon Google's full compliance with the proposed package of commitments.[275] This decision links the theory of harm to the concept in the Horizontal Merger Guidelines that a merger can hinder effective competition if it grants the merged entity too much control over an asset, making it harder for competitors to expand or enter the market.[276] The intended deal showed minimal overlap in business activities between Google and Fitbit.[277]

In response to the Commission's competition concerns, Google proposed the Final Commitments[278], including: (i) Google commits not to use health and wellness data from Fitbit devices in the EEA for Google Ads. Fitbit's user data will be technically separated and stored separately. EEA users can decide whether their health and wellness data can be used by other Google services. (ii) Google will maintain free and consent-based access to health data through Fitbit's Web API. (iii) Google will provide free licenses of essential public APIs for wrist-worn device compatibility. Android API commitment ensures no bypass and includes enhancements for Fitbit through private APIs. Wearable Original Equipment Manufacturers ('**OEMs**') will have

[272] Walle (n 263) 7-8.
[273] Bernd Meyring and William Leslie, 'Google closes its acquisition of Fitbit following European Commission conditional clearance' (*Link Laters: LinkingCompetition* 28 January 2021) < https://www.linklaters.com/en/insights/blogs/linkingcompetition/2021/january/google-closes-its-acquisition-offitbit-following-european-commission-conditional-clearance> accessed 06.09.2023.
[274] *Google/Fitbit* (n 14) paras 846-866.
[275] Ibid para 1010.
[276] Walle (n 263) 3.
[277] Mergers: Commission clears acquisition of Fitbit by Google, subject to conditions (n 265).
[278] *Google/Fitbit* (n 14) para 944.

access to all Android APIs.[279]

The Commission's decision to approve Google's proposed Fitbit acquisition comes on the back of enhanced commitments that address competition concerns. This approval is in line with broader efforts to foster fairness in digital markets, exemplified by the proposed Digital Markets Act.[280] The Commission also adopted a forward-looking approach, allowing for a potential 10- year extension of the Ads Commitment to safeguard competitiveness. The decision to extend commitments for an unprecedented 20-year period is based on Google's dominant position in online advertising. This approach anticipates industry changes and aims to accommodate emerging inputs and innovations.[281]

The green light for the Fitbit acquisition underscores the significance of these commitments, which play a pivotal role in creating an environment characterized by openness and healthy competition in the realms of wearables and digital health. These commitments are instrumental in regulating data utilization, promoting interoperability, and ensuring responsible sharing of user data, collectively benefiting consumers and contributing to the development of a vibrant digital landscape.[282]

Observations

Large digital platforms, including Google, are actively pursuing acquisitions, with notable examples like the Fitbit acquisition, which is one of over 200 acquisitions by Google. This case marks a significant milestone for the European Union, representing the first anticompetitive decision with behavioral commitments within the context of Big Tech acquisitions.[283] It also introduce a new dimension to the EU's regulatory toolkit, involving continuous monitoring and

[279] Ibid paras 952-961.
[280] Ibid para 1010.
[281] Ibid 967/d.
[282] Mergers: Commission clears acquisition of Fitbit by Google, subject to conditions (n 265).
[283] Walle (n 263) 1-2.

oversight. This signals a fundamental shift in how the EU addresses competition concerns. Of particular significance is the acceptance of a 'data silo' commitment, which sets a precedent that may influence future remedies for data-related issues in tech transactions. Importantly, it signifies a departure from the EU's traditional approach to antitrust remedies reflecting a noteworthy shift in their strategy for evaluating mergers in data-driven sectors.[284]

Regarding innovation concerns, the current connection between smartwatches and smartphones raises questions about Google potentially limiting compatibility with rival watches to boost Fitbit sales and data collection. This requires assessment based on its potential to distort competition. Google might also weaken Android's connection to competitor watches, requiring a balance between increased watch sales and data collection versus reducing Android's appeal. Assessing Google's motives involves balancing these gains against the drawback of making Android less appealing. While we can estimate the added value of Fitbit sales, other trade-off factors remain uncertain. There's a lack of reliable evidence on the worth of Fitbit data, likely due to the absence of market demand or uniqueness. Additionally, limiting Android access could result in significant reputation costs for a company known for its openness, making quantification challenging.[285]

Behavioral Remedies and Global Response

While most national competition authorities have expressed support for these remedies, indicating their willingness to consider such measures in digital cases, Google's acceptance of behavioral remedies has generated considerable debate.[286] Although the EU, Japan, and South Africa approved the deal with similar remedies, some states took a different stance.

[284] Meyring and Leslie (n 273).
[285] Pierre Regibeau, 'Why I agree with the Google-Fitbit decision'(*The CEPR: VOXEU COLUMN*, 13 March 2021) < https://cepr.org/voxeu/columns/why-i-agree-google-fitbit-decision> accessed 08.09.2023.
[286] Walle (n 263) 1-2.

In Australia, concerns about effective monitoring and enforcement led to an enforcement investigation following Google's acquisition. In the United States, the acquisition continued despite an ongoing Department of Justice investigation, potentially influenced by the transition from the Trump to the Biden administration. Interestingly, objections did not result in court challenges in this case.[287] BEUC, representing consumers across 32 European countries, also expresses disappointment in the European Commission's approval of Google's Fitbit takeover. They view it as insufficient in safeguarding consumer interests in competitive wearables and digital health markets. The approval is seen as enabling Google to extend its dominance and control over data, potentially constraining innovation and choice in health and fitness tech. Concerns persist regarding data exploitation and limited healthcare options, underscoring the limitations of EU merger control in addressing unchecked market expansion.[288]

Addressing competition concerns in rapidly evolving product markets presents distinct challenges. Ensuring interoperability for Fitbit's competitors is particularly intricate due to the ever-changing tech landscape. A broader issue emerges regarding remedy modification, often benefiting merging parties. This leads to discussions about potentially empowering competition authorities to modify ineffective remedies, which could shift their role toward a more regulatory one. The effectiveness of these remedies will serve as a crucial test case. The European Commission had the opportunity to adopt a comprehensive approach, encompassing various markets for Google's acquisition of Fitbit, such as wearables, operating systems, apps, and digital health. Unfortunately, the Commission did not seize this opportunity and instead adhered to a limited market-by-market approach. This approach has been subject to criticism for its perceived

[287] Ibid 8-9.
[288] The European Consumer Organisation, 'Google's Fitbit takeover: EU merger control proves unable to protect consumers in the digital economy' (2020)< https://www.beuc.eu/press-releases/googles-fitbit-takeover-eumerger-control-proves-unable-protect-consumers-digital> accessed 09.09.2023.

lack of rigor and inconsistency with the Commission's established remedies framework.[289]

Another perspective on this case is that merger review aims to prevent mergers from harming consumers by assessing their impact on prices, quality, variety, and innovation. This assessment involves comparing the post-merger situation to the counterfactual, which is the scenario without the merger. In the case of Google's acquisition of Fitbit, rejecting the merger wouldn't have stopped Google from entering the digital health sector. While Google might have initially faced challenges matching Fitbit's software expertise, it would eventually overcome them. The likely counterfactual scenario is a delay in Google's entry into the wearable health-monitoring sector and access to related data.[290]

4. Exploring Killer Acquisitions: Competitive Effects, Challenges, Regulatory Concerns, and Diverse Perspectives

4.1. Challenges and Regulatory Concerns in Addressing Killer Acquisitions: An In-Depth Examination

Some common challenges and concerns related to addressing killer acquisitions in antitrust regulations are essential to recognize, as we have mentioned above in the digital market section. These issues collectively underscore significant hurdles in the efforts to identify, understand, and prevent anti-competitive behavior through mergers and acquisitions. Let's delve into each of these challenges to gain a more com prehensive understanding of the complexities involved in tackling killer acquisitions.

[289] Jay Modrall, 'Google/Fitbit – The EU Commission Misses a Step' *(Kluwer Competition Law Blog*, 17 June 2021) <https://competitionlawblog.kluwercompetitionlaw.com/2021/06/17/google-fitbit-the-eu-commissionmisses-a-step/> Accessed 09.09.2023.
[290] Regibeau (n 285).

4.1.1. Vague Definition of Killer Acquisitions

The EU may lack a precise and universally accepted definition of what constitutes a killer acquisition. This ambiguity can hinder the identification of transactions that warrant scrutiny based on potential competition concerns.

4.1.2. Lack of Clarity in Anti-Competitive Intent

In the EU, determining the anti-competitive intent behind an acquisition can be elusive (whether it's genuinely for innovation or for eliminating competition). Acquiring companies often present legitimate business justifications for their actions, such as synergies or efficiency gains. This can create ambiguity and make it challenging to establish clear anti-competitive motives.

4.1.3. Increased Uncertainty in the Article 22 Guidance

(i) Threshold Ambiguity

The Guidance did not provide clear thresholds for determining when an acquisition should be considered a potential killer acquisition. This ambiguity made it difficult for competition authorities to apply Article 22 consistently.

(ii) Lack of Explicit Timeframes

However, a significant challenge arises from the lack of explicit timeframes provided in the Guideline for completed transactions, complicating the evaluation process, and raising doubts about the effectiveness of addressing completed killer acquisitions.[291]

The European Commission has the power to assess closed transactions within six months of completion, but exceptions exist when transaction details were not publicly disclosed in the EU. This discretion allows the EC to accept referrals even after the six-month limit, particularly if

[291] Haria, Virgos and Malhi (n 129).

there's potential harm to consumers or a significant threat to competition.[292] Thus, companies engaging in acquisitions and mergers must grapple with the specter of unpredictable post-closing reviews by the EC. This leaves businesses perpetually exposed to the possibility of EC scrutiny for completed transactions, offering no assurance against future investigations. The timeline for such reviews remains unclear, and the EC retains the authority to assess transactions beyond the initial six-month period. These uncertainties pose significant challenges for businesses navigating the digital market landscape.[293]

(iii) Subjective Assessment of 'Made Known'

Moreover, the determination of what constitutes 'made known' is subject to subjective assessment,[294] as the Guidance states that National Competition Authorities will be considered 'made known' if they possess sufficient information to make a preliminary assessment.[295] The guidance tries to clarify that the term 'made known' should be interpreted as having enough information to initiate an initial assessment of whether the referral criteria are met. Also, a significant concern arises from the ambiguity surrounding what qualifies as 'sufficient information' to be deemed 'made known'.[296] The voluntary nature introduces a degree of uncertainty as it doesn't clearly specify what constitutes 'sufficient information', thereby potentially adding bureaucracy and uncertainty, especially for digital platforms.[297]

As an illustrative example, France submitted its referral request in March 2021, six months after extensive public announcements, in the case 'Illumina/Grail'. The uncertainty in interpreting the term 'made known' is likely to raise concerns about the principles of legal clarity and

[292] Amil Jafarguliyev, 'Capturing Killer Acquisitions in Digital Markets under the European Union Merger Control Rules' (PhD thesis, Lund University 2023) 11.
[293] Ibid 11-12.
[294] Latham&Watkins (n 108).
[295] Jafarguliyev (n 292) 11.
[296] Ibid 9.
[297] Ibid 1.

reasonable expectations.[298]

(iv) Interpretation of 'Innovation'

The EU operates in a diverse and dynamic market with numerous industries, each having its own innovation dynamics. Assessing the impact of an acquisition on innovation requires a deep understanding of these nuances, making it complex and resource intensive.

Furthermore, determining whether an acquisition has the potential to stifle innovation or harm competition in the EU market can be subjective. The term 'potential innovation' lacks a standardized definition, and different parties may interpret it differently. This makes it difficult to establish a consistent evaluation framework.

4.1.4. Problems in Practice

(i) Cross-Border Transactions

The EU consists of multiple member states with varying interpretations and enforcement capabilities. Coordinating efforts among these entities to evaluate potential competition and innovation effects can be challenging and may result in inconsistencies. Also, assessing their potential impact on innovation and competition across different jurisdictions can be intricate. Harmonizing assessment procedures across these borders poses a considerable challenge.

(ii) Data Accessibility and Sharing

Gathering comprehensive evidence related to potential competition and innovation can be hindered by limited data accessibility and sharing among EU member states. Access to relevant information, especially cross-border data, can be challenging, affecting the depth of the assessment.

[298] Ibid.

(iii) Scrutinizing Strategic Partnerships (e.g., Licensing and R&D Collaborations)

Certain strategic partnerships, including licensing and R&D collaborations, may require heightened antitrust scrutiny. The review process should encompass these partnerships to prevent potential anticompetitive behavior. Relying solely on merger control for killer acquisitions may lead to an increase in licensing and R&D collaborations, which, in some cases, can be equally anticompetitive. Thus, even partnerships that do not meet standard merger control thresholds should undergo a rigorous antitrust assessment.[299]

4.2. Competitive Effects of Reducing Killer Acquisitions

In the scenario where a dominant company acquires a smaller competitor, it eliminates a potential source of competition, resulting in diminished rivalry within the industry. Consequently, killer acquisitions impede competition by reducing the number of players in a market. If killer acquisitions were to decrease, we would observe a more competitive market, as outlined below:

4.2.1. Market Diversity

Regulations targeting killer acquisitions can contribute to maintaining a diverse and dynamic marketplace with a variety of players. This diversity fosters competition and prevents a few dominant companies from controlling entire industries.

4.2.2. Promotion of Fair Competition

Regulations aimed at curbing killer acquisitions promote fair competition by preventing larger companies from using their financial power to eliminate potential rivals unfairly.

4.2.3. Reduced Higher Prices

With reduced competition, companies may have more control over pricing. In the absence

[299] Lundqvist (n 1) 282.

of competitive pressure, they may raise prices for their products or services and this can result in higher costs for consumers, potentially impacting their budgets and overall well-being. However, the implications of reduced competition extend beyond higher prices and directly affect consumer choice and innovation.

4.2.4. Consumer Choice

A competitive market typically leads to greater consumer choice. Regulations addressing killer acquisitions, such as Article 22 EUMR, aim to ensure that consumers continue to benefit from a range of options. When larger companies eliminate potential competitors through killer acquisitions, consumers have fewer choices when it comes to selecting products or services. With fewer choices, consumers may have to settle for less desirable offerings and may face increased costs.

4.2.5. Innovation Impact

One of the crucial aspects of addressing killer acquisitions is early intervention to preserve innovation within competitive markets. Killer acquisitions often aim to secure market dominance rather than promote efficiency. Regulations targeting these acquisitions empower competition authorities to step in early, well before the acquisition is finalized. This proactive approach enables thorough assessments of the acquisition's impact on competition, innovation, and market dynamics, preventing anticompetitive practices.

By preventing larger companies from acquiring innovative startups solely to eliminate potential competition, these regulations foster an environment where innovative firms can thrive. This not only encourages ongoing investment in research and development but also ensures that consumers continue to benefit from ongoing advancements in products and services.

In essence, these regulations effectively act as guardians of innovation, promoting a

dynamic and forward-thinking marketplace where groundbreaking ideas can flourish while also safeguarding consumer choice and preventing unjustified price increases.

4.2.6. Investor Confidence

Clear regulations against killer acquisitions can provide a sense of stability and transparency to both startups and potential investors, encouraging investment in innovative ventures without the fear of being acquired and suppressed.

4.2.7. Economic Growth

A healthy competitive environment can contribute to economic growth by encouraging innovation, investment, and entrepreneurship. Regulations preventing killer acquisitions can help sustain this growth.

4.2.8. Global Impact

If implemented effectively, such regulations could serve as a model for other jurisdictions dealing with similar challenges, potentially promoting global efforts to curb anticompetitive practices.

4.3. Supporting Perspectives: Exploring the Positive Aspects of Killer Acquisitions

4.3.1. Positive Effects of Killer Acquisitions

(i) Cost Savings and Revenue Growth

In the realm of mergers and acquisitions, a balance between cost savings and revenue growth can lead to positive outcomes. This balance is often achieved through revenue growth strategies implemented by the newly-formed entity, known as NewCo; which includes cross-selling, expanding into new customer segments, accelerating product launches, and continuous

innovation.[300]

(ii) Reducing Innovation Costs

Mergers and acquisitions can substantially decrease innovation expenses by capitalizing on R&D economies of scale. Nevertheless, it's essential to recognize that the innovative landscape may be constrained when competitors engage in their own M&A activities, potentially limiting exploration in emerging technology fields.

(iii) Importance of Employee Retention

The success of the post-M&A phase relies heavily on retaining key employees. Various integration approaches to foster innovation include knowledge sharing, effective communication, job rotation, collaborative project teams, and specialized integration teams focused on innovation.[301]

(iv) Overcoming Uncertainty

The inherent uncertainty in M&A transactions can impede risk-taking. To overcome this challenge, there is a need to cultivate an innovation-centric culture characterized by continuous communication, the establishment of innovation metrics, recognition of innovative contributions, and a steadfast commitment to refraining from penalizing prudent risk-taking.[302]

(v) Regulatory Considerations

Both the Horizontal Merger Guidelines ('**HMG**') and Non-Horizontal Merger Guidelines ('**NHMG**') recognize the potential for M&A transactions to have positive innovation effects.

[300] Timothy J. Galpin, '*The Complete Guide to Mergers and Acquisitions: Process Tools to Support M&A Integration at Every Level*' (3rd ed. New York 2014).
[301] Ibid.
[302] Ibid.

These effects are often assessed through efficiencies proposed by the merging parties, including improvements in products and services driven by gains in R&D and innovation. Parties must demonstrate that these innovation-related efficiencies will benefit consumers, be verifiable, and unique to the merger. In some cases, these efficiencies may outweigh any anti-competitive effects.[303] Notably, NHMG emphasizes that non-horizontal mergers, particularly vertical and conglomerate ones, are more likely to generate efficiencies compared to horizontal mergers among competitors.[304]

(vi) Remedies Effectiveness

Determining appropriate remedies for killer acquisitions can be complex. Simply blocking an acquisition may not always be the best solution, especially if the target company is financially distressed.

(vii) Evolution of Business Models

Rapid changes in technology and business models meant that traditional antitrust frameworks may not always be well-suited to address emerging competition issues.

4.3.2. Small Companies' Upside: How Smaller Firms Benefit from Mergers

Despite the potential risks associated with killer acquisitions in a competitive market, some small startups actively seek acquisition opportunities. Smaller firms often pursue acquisition for various compelling reasons. In a survey carried out by Silicon Valley Bank, many startups, especially those in the technology sector, with fewer than 25 employees and annual revenues under

$25 million, consider being acquired as a long-term goal. This desire can foster innovation

[303] European Commission, 'EU merger control and innovation' (Competition policy brief 2016-01, April 2016) 4 < https://ec.europa.eu/competition/publications/cpb/2016/2016_001_en.pdf> accessed 10 September 2023.
[304] Ibid 4.

and support the emergence of startups that might not otherwise come into existence.[305] Choosing acquisition over an initial public offering ('**IPO**') can be difficulties to the challenges associated with IPOs. In 2019, the IPO landscape was characterized by mixed success stories, with numerous companies encountering difficulties after going public. For instance, prominent startups like Lyft, Uber, Pinterest, and Slack faced post-IPO challenges, and WeWork's valuation experienced a significant decline. While exceptions like Zoom exist, the hurdles associated with going public have led startups to favor the acquisition route. This trend is evident in the dwindling number of IPOs, dropping from 486 in 1999 to 159 in 2019.[306]

Moreover, acquisition can hold significant appeal for startups grappling with limitations in raising capital, attracting top talent, and complying with regulations. As a result, leveraging their agility to initiate operations and subsequently being acquired by a larger company has become a viable strategy for smaller firms.[307] Furthermore, in specific scenarios, blocking an acquisition may not always be the most advantageous approach, especially when the target company is facing financial adversity.

4.4. Perspectives of Scholars

Scholars hold varying perspectives regarding the impact of competition on innovation. Some argue that reduced competition can stimulate innovation because it increases the potential rewards for innovators. This motivation leads to more investment in R&D and innovation, even when price competition is low.[308] On the other hand, some scholars believe that increased competition drives innovation. Companies strive to excel by creating better or more cost-effective products, and such innovations are highly valued in competitive markets. They focus on the

[305] Fayne (n 22) 10.
[306] Ibid 10.
[307] Ibid 10.
[308] Competition policy brief 2016-01 (n 303) 1 (note: Schumpeter's Perspective).

difference in profits before and after innovation.[309] Others suggest a middle ground, acknowledging that both perspectives have merit. They emphasize the importance of open markets, innovation incentives tied to appropriability (capturing the value of innovation), and the amplification of innovation possibilities through synergies.[310]

In summary, some scholars stress the role of competitive markets in promoting innovation, while other's theory emphasizes rewards after innovation. The key strategy involves maintaining competitive markets and protecting IP rights to encourage innovation, aligning with both viewpoints.[311] Additionally, these differing opinions also extend to the impact of mergers on innovation. Some argue that mergers can hinder innovation by reducing competition, while others believe mergers can enhance innovation through increased resources and synergies. The effects of mergers on innovation continue to be a subject of ongoing debate among scholars and policymakers.

Moreover, it's important to note that these differing opinions also extend to the effects of mergers on innovation. Some argue that mergers can stifle innovation by reducing competition, while others contend that mergers can lead to greater innovation through increased resources and synergies. The impact of mergers on innovation remains a topic of ongoing debate among scholars and policymakers.

5. Recommendations

5.1. Regulatory Recommendations

To enhance the effectiveness of EU regulation and guidance for killer acquisitions, promote transparency, and address the evolving challenges in the realm of competition and innovation –

[309] Ibid 2 (note: Arrow's Perspective).
[310] Ibid 2 (note: Carl Shapiro's Perspective).
[311] Ibid 2.

the EC should take these into consideration:

5.1.1. Vague Definition of Killer Acquisitions

Developing a specific definition of 'killer acquisitions' that includes clear criteria and thresholds for identifying transactions that merit antitrust scrutiny based on potential competition concerns.

5.1.2. Lack of Clarity in Anti-Competitive Intent

Establishing comprehensive guidelines and examples for regulators to assess the intent behind acquisitions, considering factors like market power, behavior, and stated business justifications. Also, encouraging acquiring companies to provide more transparent information about their intentions during the review process.

5.1.3. Regarding the Increased Uncertainty in the Article 22 Guidance

Four key areas warrant attention for improvement. First, addressing threshold ambiguity is essential. Clear thresholds need to be established for identifying potential killer acquisitions, possibly by setting limits exclusively for undertakings that are dominant or have the potential to become so. Second, there's a need to define explicit timeframes for transaction evaluations to prevent uncertainty and ensure reviews occur promptly. A broader time limit may be considered to align with international trade law principles, offering parties a degree of security. Thirdly, standardizing the interpretation of 'made known' is essential to reduce subjectivity and promote consistency among Member States. Providing precise guidelines for determining when a transaction qualifies as 'made known' can enhance legal certainty and foster legitimate expectations.[312] Finally, there's a need to establish a standardized definition of 'potential

[312] Latham&Watkins (n 108).

innovation' to create a common evaluation framework and enhancing the expertise within regulatory bodies is crucial to understand the nuances of various industries and their innovation dynamics.

5.1.4. Regarding the Problems in Practice

Facilitating data sharing among EU member states and improving cross-border data accessibility is essential, as is the establishment of mechanisms for greater coordination and consistency among member states. Finally, harmonizing assessment procedures for cross-border transactions is imperative to ensure a consistent approach in evaluating potential innovation and competitive effects.

5.1.5. Remedies Effectiveness

The approach to addressing merger concerns can be broadened by considering alternative remedies, which may include divestitures, licensing, or behavioral conditions, providing a more flexible framework that allows some acquisitions to proceed. Moreover, it's crucial to establish a mechanism for monitoring and evaluation of the effectiveness of remedies in merger cases, enabling adjustments and modifications as necessary to ensure their continued relevance and success.

5.1.6. Simplifying the IPO Process for Financially Struggling Small Companies

Recognizing that small companies often face financial challenges that make them more inclined towards acquisition, it is advisable to consider simplifying the IPO process for such firms. This could involve simplifying regulatory requirements and reducing administrative burdens for small companies seeking to go public, thereby making the IPO route more accessible. Cost-effective solutions, such as reduced fees for regulatory filings and compliance, can significantly lower the financial barriers associated with IPOs. Providing tailored guidance and support

throughout the IPO process, including mentorship programs, educational resources, and access to experienced advisors, can help small companies navigate the complexities and challenges. More flexibility in choosing the timing of their IPO allows small companies to better align their market entry with favorable economic conditions, reducing the risk of encountering post-IPO challenges. Promoting transparency in financial reporting and information dissemination can boost investor confidence in small companies, making them more attractive IPO candidates.

Additionally, expanding access to capital markets for small companies through initiatives like secondary markets or specialized exchanges can provide alternative pathways to raise funds without undergoing a full IPO process. Preventing a merger for a financially distressed small startup solely due to competition law reasons without offering alternative options may not be an effective solution and may hinder the healthy dynamics of the market. By implementing these measures, regulators and policymakers can encourage small companies to consider IPOs as a viable option to address financial challenges, thereby reducing the reliance on acquisition as the primary exit strategy and contributing to a more diverse and dynamic business ecosystem.

5.1.7. Scrutinizing Strategic Partnerships (e.g., Licensing and R&D Collaborations)

It is also crucial to expand the scope of Article 22 Guidance to include strategic partnerships, such as licensing agreements and R&D collaborations, that have the potential to significantly impact competition. These collaborations, even if they fall below traditional merger control thresholds, should undergo more rigorous antitrust assessments to protect fair competition. Relying solely on the control of killer acquisitions might inadvertently promote an increase in licensing and R&D collaborations, which can sometimes exhibit anti-competitive behavior similar to killer acquisitions. In essence, this could serve as an avenue to circumvent merger control assessments and potentially allow larger companies to exert undue influence. Thus, establishing a framework for stricter antitrust assessment, even in cases where traditional merger control

thresholds are not met, is crucial to ensure the preservation of fair competition.

5.2. Recommendations to Big Companies Before Merging

To navigate mergers and acquisitions securely while safeguarding innovation and competition, and to reduce the risk of involvement in killer acquisitions, companies should take the following steps into consideration:

Before the Merger:

To effectively navigate merger and acquisition processes, a series of strategic steps are essential. Thorough due diligence is imperative, involving a comprehensive assessment of the competitive landscape, potential antitrust concerns, and indications of killer acquisition risks, which includes evaluating the target's market position, patents, and potential competitive threats. Engaging experienced antitrust lawyers for legal counsel is crucial to handle complex regulatory issues and ensure compliance with competition laws. Assessing the innovation potential of the merger and its alignment with the company's long-term strategy is key, considering how it can lead to synergies in research and development, product development, and technology. Early communication with competition authorities in case of antitrust concerns is advised to seek guidance and prevent potential issues in the future. Additionally, proactive exploration of potential remedies to address competition issues and secure regulatory approval should be considered when antitrust concerns arise.

After the Merger:

Effective merger management requires a multifaceted approach. Proactive information sharing is crucial, with undertakings providing comprehensive details about their transaction to all 27 Member States to promptly initiate the Article 22 referral timeline, expediting the 6-month

review period. A well-defined integration strategy should be developed to ensure innovation and competition are preserved, with a focus on retaining key employees, especially those in research and development. Compliance with competition laws remains a priority, including the establishment of processes for regular reporting and compliance checks. To gauge the merger's impact on innovation and competitiveness, innovation metrics should be established and continuously monitored. Competitive effects in the market must be assessed continuously, with a readiness to address any anti-competitive behavior. Transparency in communication and reporting, both internally and externally, is vital to build trust and demonstrate commitment to fair competition. Engaging with industry associations, customers, and partners to gather feedback on the merger's impact on competition and innovation is essential. Lastly, remaining flexible and adaptable in response to changing market dynamics, regulatory developments, and competitive pressures is key to successful merger management.

Briefly, to navigate safely the complexities of mergers and acquisitions while safeguarding innovation and competition, the companies should take these into considerations and ultimately reducing the risk of engaging in or becoming a victim of killer acquisitions.

6. Conclusion

In the changing landscape of mergers and acquisitions, the phenomenon of 'killer acquisitions' has emerged as a significant concern, challenging the traditional notions of competition and innovation. This thesis has undertaken a comprehensive exploration of killer acquisitions within the EU, shedding light on their definitions, underlying theories of harm, and real-world instances in both pharmaceutical and digital markets. Through this journey, we have gained valuable insights into the dynamics of killer acquisitions and their potential impact on market competition, consumer choice, pricing, and innovation. It has become evident that these

strategic maneuvers by large companies, aimed at eliminating future competitors and avoiding substantial investments in research and development, pose genuine challenges to regulatory bodies. Moreover, the EU has responded with regulatory tools, including Article 22 Guidance and the Digital Market Act, to address these challenges and adapt to the evolving landscape of corporate acquisitions. While progress has been made, it is important to acknowledge that there are still some gaps that need improvement in the regulatory framework. The definition of killer acquisitions, in particular, remains a point of contention, and the effectiveness of remedies requires further evaluation. Additionally, this thesis has generated a set of recommendations aimed at enhancing the regulatory response to killer acquisitions, fostering greater transparency, and refining the assessment of potential innovation and competitive effects.

Thus, the study underscores the need for ongoing scrutiny and adaptation in the regulatory landscape to strike a balance between fostering a competitive market and encouraging innovation while preventing anti-competitive practices. As we navigate the ever-evolving business environment, the lessons drawn from this exploration, along with the recommendations put forth, will continue to inform policies and strategies that promote a dynamic and equitable marketplace. The path forward involves addressing the remaining challenges, closing regulatory gaps, and ensuring that the regulatory framework remains responsive to the evolving dynamics of corporate mergers and acquisitions.

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