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Merger regulation of killer acquisitions under European competition law in European and international comparison

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Introduction

Competition authorities have traditionally mainly focused on large acquisitions, as merging undertakings need to generate significant turnover to trigger the attention of competition authorities. The same applies to the European Competition Law. The current regulation No 139/2004 (Merger Regulation) sets high threshold criteria, as exemplified by the acquisition of WhatsApp by Facebook in 2014, which did not meet the European notification thresholds and was only reviewed by the European Commission (Commission) due to the referral mechanism contained in the Merger Regulation.[1] The turnover thresholds have been left unchanged since 1998. It should be noted that this merger was notifiable under the national competition rules of Member states otherwise the referral mechanism in Article 4(5) of the Merger Regulation would not be applicable. However, what happens in cases where a company, typically a start-up, is not generating any turnover and is acquired by a larger player in the market, thus making the transaction not notifiable to the competent authorities? Prior to 2018, such transactions would likely go undetected and would not raise any competition concerns.

In 2018 a paper labelled "*Killer Acquisitions"* by Colleen Cunningham et al was published. It introduced the term killer acquisition and described it as a situation in which an incumbent undertaking acquires a start-up with an innovative product which could pose a significant threat to the acquiring undertaking. Such start-ups are acquired by the incumbent with the intention to "*discontinue the targets innovation project and pre-empt future competition.*[2]*"* It was also argued that such acquisitions are usually not scrutinized by the competition authorities as the notification criteria were not met.[3]

Recital 6 of the Merger Regulation states that: "*A specific legal instrument is therefore necessary to permit effective control of all concentrations in terms of their effect on the structure of competition in the Community.*" This statement emphasizes the need to prevent any potential loopholes that could enable concentrations with the potential to adversely affect competition on the internal market from evading scrutiny under the Merger Regulation. In other words, the merger control regime should be bulletproof. However, it is argued that the current

[1] Decision of the European Commission of 03 October 2014, Facebook/ WhatsApp, M.7217

[2] Colleen Cunningham, Florian Ederer, and Song Ma, 'Killer Acquisitions', *SSRN Electronic Journal*, 2018, p. 1, https://doi.org/10.2139/ssrn.3241707.

[3] Ibid., p. 4.

merger control is not bulletproof especially in the light of killer acquisitions.[4] thus, a regulatory gap exists.

On the 26th of March 2021, the "Evaluation of procedural and jurisdictional aspects of EU merger control" (EU Evaluation Report)[5] was published. Some National Competition Authorities and other stakeholders expressed the same view about the existence of a regulatory gap and advocated for the introduction of complementary jurisdictional criteria, in particular the value-based threshold.[6] However, there are also other ways how the competition authority might assert jurisdiction over a merger.

In a global context, there exist four primary jurisdictional criteria utilized to assert jurisdiction over concentrations: turnover-based, asset-based, market share-based, and transaction value-based criteria[7]. While most jurisdictions employ turnover-based criteria,[8] some jurisdictions, utilize a combination of turnover and other criteria.

The main objective of this thesis is to propose modifications to the existing EU merger control toolbox, with a particular focus on potential amendments to the Merger Regulation. Under the current framework, such concentrations, including killer acquisitions, have the potential to elude the Commission's scrutiny. Consequently, this thesis seeks to explore and advocate for changes to the Merger Regulation that would equip the Commission with enhanced authority to address the challenges posed by killer acquisitions and ensure the preservation of a competitive market.

Research question and methodology

The central focus of this thesis is to evaluate the various jurisdictional criteria in light of the phenomenon of killer acquisitions. Specifically, the aim is to assess whether these criteria can be effectively employed to assert jurisdiction over killer acquisitions and to analyse the

[4] Monika Woźniak-Cichuta, "Teleological Perspective of EU Merger Control and its Interplay with Killer Acquisitions on Digital Markets", p. 151, In Šmejkal, Václav, ed. EU Antitrust: Hot Topics & Next Steps: proceedings of the international conference held in Prague on January 24-25, 2022. Praha: Charles University, Faculty of Law, 2022.

[5] "*Evaluation of procedural and jurisdictional aspects of EU merger control*", March 2021, https://ec.europa.eu/competition/consultations/2021_merger_control/SWD_findings_of_evaluation.pdf

[6] Ibid, para.88-91

[7] OECD (2021), OECD Competition Trends 2021, Volume II, Global Merger Control, p.11, http://www.oecd.org/competition/oecd-competition-trends.htm

[8] Ibid, p. 7

advantages and drawbacks associated with each criterion or their combinations, depending on the approach adopted by different jurisdictions. The asset-based thresholds are going to be omitted in the following analysis as they suffer from the same drawback as the turnover-based thresholds, i.e., a young innovative business usually does not possess the needed value of assets triggering the notification threshold.[9]

The analysis of the various jurisdictional approaches will be conducted on the basis of the specific objectives of the EU jurisdictional provisions, i.e., they must allow the Commission to "*capture concentrations that may lead to lasting damage to competition in the internal market"*[10] (Effectiveness criteria) and at the same time provide the merging businesses with the opportunity to self-assess if their mergers shall be notified or not (Predictability criteria).[11] Moreover, recital 8 of the Merger Regulation provides that only concentrations whose impact "*goes beyond the national borders of any one Member State*" shall be scrutinised by the Commission (EU dimension).

The EU dimension correlates with the OECD Recommendation of the Council on Merger Review (OECD Recommendation)[12] which provides that jurisdiction should be asserted only over mergers with sufficient local nexus. This view is also supported by the ICN Recommended Practices for Merger Notification and Review Procedures (ICN Recommendation) which also advocate for the need of a material nexus to the local jurisdiction as the review of transactions which likely will not appreciably affect the competition within its territory, thus, saving costs both of the merging companies and the competition authorities.[13]

Both the OECD Recommendation and ICN Recommendation also advocate for the use of clear and objective criteria which correspond to the Predictability criteria.

The key research question to be addressed in this thesis is as follows: "*How can the existing toolbox available to the European Commission, particularly the Merger Regulation, be amended to enable the Commission to assert jurisdiction over killer acquisitions that typically do not meet the current turnover-based thresholds but might affect the competition within the*

[9] Daniela Stephanie Schoch, 'Mergers and Acquisitions in the Data Economy', *SSRN Electronic Journal*, 2020, p. 2, https://doi.org/10.2139/ssrn.3686247.
[10] EU Evaluation Report , p. 35, supra note 5
[11] Ibid
[12] OECD, Recommendation of the Council on Merger Review, OECD/LEGAL/0333, https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0333
[13] ICN Recommended Practices for Merger Notification and Review Procedures, p. 4, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf

internal market while maintaining the business with the possibility of easily administrable self-assessment if the notification is required or not?"

The methodology employed in this thesis is going to primarily utilize a descriptive and analytical approach to address the research question. The main sources include relevant legislation, decisions of competent authorities, soft-law documents and other documents published by competition authorities or national legislators Additionally, jurisprudence from academic articles and research papers and reports for policymakers will be analysed.

It is important to note that the topic of killer acquisitions encompasses not only legal aspects but also economic and political considerations. While the economic aspect of the issue may be briefly touched upon, the focus of this thesis is the legal dimension. The author acknowledges that any potential amendment to the Merger Regulation, aside from changes to the turnover threshold, would require unanimous approval in the Council, which may pose challenges. However, this factor will not be considered while addressing the research question.

Chapter I – Killer acquisition and regulatory gap

1.1 Regulatory gap in the current EU merger control regime

In June 2020, the OECD held a roundtable on "*Start-ups, Killer Acquisitions, and Merger Control,*" (2020 OECD Roundtable) discussing, among other topics, how to ensure that killer acquisitions are scrutinized by competent authorities. The Commission noted in its note that acquisitions of start-ups may "*not be caught by turnover-based notification thresholds, like the ones underpinning EU merger control, and escape merger scrutiny altogether.*[14]*"*

Vestager, the commissioner responsible for competition in her speech at the International Bar Association 24th Annual Competition Conference in September 2020 introduced a change of policy and announced that unlike in the past, the Commission is now ready to start accepting referrals from the Commission even if the national notification criteria are not met. This could be done only via the referral mechanism enshrined in Article 22 of the Merger Regulation. The Commissioner also stressed that such a major change of policy cannot happen overnight and promised to issue guidance so every stakeholder, most notably national competition authorities and undertakings, are aware of what to do.[15]

The EU Evaluation Report concluded that: "*the turnover-based jurisdictional thresholds of the EU Merger Regulation, complemented with the referral mechanisms, have generally proved effective in capturing significant transactions in the EU internal market.*"[16] However, it was also noted that new market trends and technological developments may result in the ineffectiveness of the purely turnover-based thresholds.[17] The EU Evaluation Report, furthermore, highlighted concerns that the Commission's strategy of discouraging national authorities from making referrals in situations where the relevant national criteria are not satisfied could impede the effectiveness of the referral mechanism. In addition, it was suggested that ongoing monitoring of jurisdictions with differing approaches is necessary.[18]

[14] Start-ups, killer acquisitions and merger control – Note by the European Union, para. 7, https://one.oecd.org/document/DAF/COMP/WD(2020)24/en/pdf

[15] Speech Margrethe Vestager, "The future of EU merger control" (International Bar Association 24th Annual Competition Conference 11 September 2020)

[16] *EU Evaluation Report,* para. 266, supra note 5

[17] Ibid, para. 39

[18] Ibid, para. 269

Consequently, the Commission published on the 31st of March 2021 Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases.[19] Notably prior to the issuance of these guidelines first "victims" of the new Commission approach were US-based undertakings *Illumina* and *Grail* whose merger was scrutinized by the Commission because Article 22 of the Merger Regulation was used.[20] Unsurprisingly, representatives from both companies expressed dissatisfaction with the decision of the Commission, contending that such utilization of Article 22 of the Merger Regulation could potentially result in an unrestricted scope of jurisdiction for the Commission as it would allow for the assessment of any merger, irrespective of whether the entities involved are engaged in business activities within Europe or not.[21]

Nonetheless, the General Court of the Court of Justice of the European Union reviewed and upheld the Commission's decision with the appeal pending before the Court of Justice.[22] This decision shed light on some issues stemming from the Commission's approach, however, only the Court of Justice can provide the final answer.

Apart from the referral mechanism contained in Article 22, the Commission may assert jurisdiction over a concentration using Article 4 paragraph 5 of the Merger Regulation as was done in the Facebook/WhatsApp case.[23] However, certain conditions must be fulfilled for this provision to apply. Specifically, the concentration under consideration must be subject to notification in a minimum of three Member States. Furthermore, if any of these Member States opposes the referral, jurisdiction over the concentration remains with the affected Member States, thereby precluding the Commission from reviewing the said transaction. It is important to note that the effectiveness of this referral mechanism hinges upon the requirement that the relevant undertakings inform the Commission. Nevertheless, it is worth considering that an undertaking engaging in a killer acquisition is unlikely to voluntarily disclose such a transaction to the Commission.[24]

[19] Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases (2021/C 113/01)

[20] Decision of the European Commission of 06 September 2022, ILLUMINA/GRAIL, M. 10188

[21]"The unintended consequences of Vestager's tougher take on 'killer acquisitions*'*, https://www.politico.eu/article/margrethe-vestager-tougher-take-boost-small-companies/

[22] Judgement of 13 July 2022, Illumina, Inc. v European Commission, T-227/21, EU:T:2022:447

[23] Facebook/ WhatsApp, *supra* note 1

[24] It could be argued that it is more cost-effective for such undertaking to wish to have its proposed acquisition reviewed by the Commission, on the other hand, the Commission compared to most of the national competition authorities has more resources and expertise to catch the killer acquisitions and prevent such acquisition from implementing.

To sum up, since it is common that in cases of killer acquisitions, the target does not generate any or very little turnover,[25] the turnover thresholds contained in the Merger Regulation are not met. Thus, the other way how the Commission can assert jurisdiction over such concentration is through the referral mechanisms contained in Article 4 paragraph 5 or Article 22 of the Merger Regulation. In the former referral mechanism, the national notification criteria must be met, the concerted undertakings must inform the Commission and the Member States affected must not disagree with the referral, only if all these prerequisites are met, then the Commission can assert jurisdiction. In the latter case also a transaction non-notifiable at the national level can be referred to the Commission, however, it is completely up to the Member State if it wishes to refer even if the Member State was invited to do so by the Commission. Furthermore, the Commission asserts jurisdiction only for the requesting Member State, while those who did not send the referral request retain the jurisdiction for their territory, hence, the one-stop-shop principle is not adhered to. Thus, it can be concluded that some acquisitions might escape the scrutiny of the Commission even if they are aware of such transactions.

Another limitation of the referral mechanism lies in the fact that most Member States employ the classical turnover criteria and only a few employ a non-turnover-based threshold such as Spain and Portugal with its market share-based threshold or Germany and Austria with the value-based threshold. Before Brexit, the referral mechanism also benefited from the share of supply test which was used to scrutinize significant mergers that escaped the scrutiny of the Commission.[26] However, now that the UK is no longer a Member State this threshold might not be used as a basis for a referral.

Nonetheless, the Merger Regulation is not the only tool how the Commission might scrutinize a merger. The CJEU in 1973 held that article 102 of the TFEU is under certain cirmustances applicable to mergers.[27] However, this judgement was issued before any merger regulation was in force. Thus, it was questioned whether article 102 of the TFEU might be applied to mergers

[25] OECD (2020), Start-ups, Killer Acquisitions and Merger Control, p. 13, www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control-2020.pdf

[26] Crémer, J., de Montjoye, Y.-A. and Schweitzer.H Competition policy for the digital era, Report to the European Commission, (2019) (Crémer Report), p. 115, https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf

[27] Judgement of 21 February 1973, Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities, case 6-72, EU: C:1973:22

after the introduction of the Merger Regulation. This question was the subject matter of a recent judgement of the CJEU, commonly known as the *Towercast* case.[28]

This case concerned a merger of two undertakings active in the digital terrestrial television broadcasting services. This merger was neither notifiable at the national or European level nor was it referred to the Commission by virtue of article 22 of the Merger Regulation. Nonetheless, other competing undertakings lodged a complaint by the French authority alleging that this merger constituted an abuse of dominant position pursuant to article 102 of the TFEU. This case reached the CJEU when the French court wanted to know if such merger could be reviewed on the basis of article 102 of the TFEU.

The CJEU held that a merger notifiable neither on the European nor national level and which was not referred to the Commission might be *ex post* reviewed on the basis of article 102 of the TFEU. However, three conditions must be met. Namely, the acquirer must hold a dominant position before the merger, the target must be an actual or potential competitor and as a result of the merger "*only undertakings whose behaviour depends on the dominant undertaking would remain in the market.*[29] *"*

Nonetheless, a question unanswered by the CJEU is if a merger could be double assessed, i.e., under the Merger Regulation and later under article 102 of the TFEU. The court stated that the Merger Regulation should be applied priority, thus, leaving the possibility of double assessment open. The advocate general, however, stated that if a merger was cleared it cannot be reviewed again unless new circumstances emerge.[30]

However, not every killer acquisition is executed by a dominant undertaking. Moreover, the danger is that the competition is already distorted, and an *ex-post* remedy might not be enough to restore the competition in the given market. Essentially this is the argument for why most of the jurisdictions have *ex-ante* merger regime control.

Furthermore, despite Commissioner Vestager's statement that Regulation No 2022/1925, the Digital Markets Act (**DMA**) is not a competition law,[31] its impact on killer acquisitions in the digital sector is major as it requires the so-called "gatekeepers" to inform the Commission of

[28] Judgement of 16 March 2023, Towercast v Autorité de la concurrence and Ministère de l'Économie, C-449/21, EU: C:2023:207

[29] Ibid, para. 52

[30] Opinion of Advocate General Kokott of 13 October 2020, Towercast v Autorité de la concurrence and Ministère de l'Économie, C-449/21, EU: C:2022:777

[31] Speech Margrethe Vestager, 'Competition in a Digital Age' (European Internet Forum, 17 March 2021).

any intended transactions regardless of whether they meet the notification criteria established at the European or national level. However, this instrument applies only to the digital sector and only the gatekeepers have special duties. Moreover, if the transaction does not meet the Merger Regulation thresholds, it is again within the discretion of the Member States if they use the referral mechanism pursuant to Article 22 to enable the Commission to assert jurisdiction.

The foregoing analysis revealed that the toolbox available to the Commission, although broad, is not flawless and some mergers might escape the scrutiny of it, hence, constituting a regulatory gap in the EU merger control regime.

1.2 Shedding light on "killer" acquisitions

Cunningham was the first to introduce the term "killer acquisitions".[32] Régibeau further developed the theory and further subcategorized this phenomenon into (i) "hard killer" (ii) "soft killer" and (iii) "victimless killer" acquisitions.[33] This classification arises from the recognition that the advantages accruing to the acquirer can in some instances extend beyond mere elimination of competition. Moreover, a reverse killer acquisition category is added.

A "hard-killer" acquisition delineates a situation in which the competing product is eliminated and no other advantages result from the acquisition. On the other hand, a "soft-killer" acquisition pertains to a situation where, in addition to eliminating a competing product, other synergies such as acquiring personnel or assets emerge. However, without the presence of anticompetitive effects, the merger would not be profitable. Finally, a "victimless-killer" acquisition is when the acquired business continues to operate, but anticompetitive effects are present, and without them, the merger would be unprofitable.[34] However, as Régibeau acknowledges, the latter scenario represents a regular merger. There is no reason to describe such an acquisition as a "killer" acquisition if the competing product remains on the market, i.e., is not eliminated. It can be concluded that in "hard-killer" acquisitions, consumers will suffer, whereas in cases of "soft-killer" acquisitions, anticompetitive effects are likely, but in some instances, the synergies might outweigh the negative effects.[35]

[32] Cunningham, Ederer, and Ma, 'Killer Acquisitions'.

[33] Pierre Régibeau, 'Killer Acquisitions? Evidence and Potential Theories of Harm', in *Research Handbook on the Law and Economics of Competition Enforcement* (Edward Elgar Publishing, 2022),p. 304–5, https://www.elgaronline.com/edcollchap/book/9781789903799/book-part-9781789903799-22.xml.

[34] Ibid.

[35] Ibid., p. 305.

In addition to the classic "killer" acquisition, where the acquired competing product is eliminated, a new term called a "reverse killer acquisition" has emerged. This term describes a situation in which the competing product of the acquirer is eliminated, while the rival acquired product continues to remain on the market.[36]

According to Cunninhgam killer acquisitions are likely to occur where there are overlapping products.[37] If the overlapping acquired product is shut-down, consumers suffer from higher prices and limited supply. On the other hand, it can be argued that ex-ante innovation incentives emerge wherein the impetus for startup founders lies in the prospect of being acquired by a larger company.[38] Nonetheless, the loss of competition leads to ex-post efficiency loss.[39] How the consumer is affected also depends on the sector where the killer acquisition is carried out. For instance, as Ederer argues if it was not for the killer acquisitions in the pharma sector and the competition would be undistorted, human lives could be preserved.[40] However, the overall effect on welfare is uncertain as a more thorough analysis has to be conducted to reach a persuasive conclusion. [41]

To sum up, both "hard-killer" and "soft-killer" acquisitions, whether they are reverse or not, can potentially harm consumers. Consequently, one of the key objectives of EU competition law, which is to safeguard consumer welfare, is at risk. Consumer welfare is *inter alia* improved by achieving allocative and dynamic efficiencies,[42] both can be hindered if such acquisitions are not thoroughly examined and scrutinized.

1.3 Where is it likely to encounter killer acquisitions?

While Cunningham focused on the pharmaceutical sector, the issue of killer acquisitions is not limited to that industry but extends to any other "*R&D-intensive industry in which new entrants can disrupt the profits of incumbents.*[43]*"* The digital sector is a notable example.

[36] Ibid., p. 306.
[37] Cunningham, Ederer, and Ma, 'Killer Acquisitions', 2018, p. 2, supra note 2
[38] Ibid., p. 42.
[39] Régibeau, 'Killer Acquisitions?', p. 312, supra note 33; Cunningham, Ederer, and Ma, 'Killer Acquisitions', 2018, p. 41–42, supra note 2
[40] Florian Ederer, 'Should Killer Acquisitions Be Banned?', CEPA, 24 September 2021, https://cepa.org/article/should-killer-acquisitions-be-banned/.
[41] Cunningham, Ederer, and Ma, 'Killer Acquisitions', 2018, p. 44, supra note 2
[42] J. W. van de Gronden and Catalin Stefan Rusu, *Competition Law in the EU: Principles, Substance, Enforcement* (Cheltenham, UK: Edward Elgar Publishing, 2021), p. 9–13.
[43] Ederer, 'Should Killer Acquisitions Be Banned?', supra note 40

Digital markets are characterized by the presence of digital platforms, strong both direct and indirect network effects and data-driven transactions. Essentially, they can be labelled as a "*winner-take-all"* market.[44] The main difference to the pharma market lies in the fact that unlike pharma competitors can never be sure who their real rival is as the market is more dynamic. As a result of the three-phase testing of new drugs pharmaceutical companies know about potential competing products, whereas in the digital a competing product can emerge out of nowhere. Therefore, Cabral concludes that the pre-emptive motive may not be as significant in the digital markets as is in pharma.[45]

The competition concerns connected to digital markers are exemplified by the statement of a co-founder of digital companies PayPal and Palantir that: "*Competition is for losers. If you want to create and capture lasting value, look to build a monopoly."*[46] The increasing role of digital markets has not been left unnoticed by the policymakers leading to reports such as the *Furman report*[47], *Stingler report*[48] and *Crémer report*[49] being adopted. It is worth noting that these reports focused on the broader impact of digitalization on competition policy with *killer acquisitions* being one of the issues. As a result, new laws and regulations such as the DMA were adopted.

In October 2020 a report concluding the investigation of competition in digital markets in the US was published.[50] It was concluded that some acquisitions were executed with the motive of neutralizing competition from nascent competitors or with the motive of maintaining and expanding dominance. Furthermore, the occurrence of killer acquisitions was established.[51]

[44] Barwise, T P, and L Watkins, 'The Evolution of Digital Dominance: How and Why We Got to GAFA' In: Digital Dominance: The Power of Google, Amazon, Facebook, and Apple. Oxford University Press, p. 30, https://doi.org/10.35065/PUB.00000914.
[45] Luís Cabral, 'Merger Policy in Digital Industries', *Information Economics and Policy* 54 (March 2021): p. 4, https://doi.org/10.1016/j.infoecopol.2020.100866.
[46] Barwise and Watkins, 'The Evolution of Digital Dominance', p. 21, supra note 43
[47] Furman, J., D. Coyle, A. Fletcher, D. McAuley and P. Marsden (2019). Unlocking digital competition. Report of the Digital Competition Expert Panel.
[48] Stigler Center for the Study of the Economy and the State, Report of the Committee for the Study of Digital Platforms (May 2019): https://research.chicagobooth.edu/stigler/media/news/committee-on-digital-platforms-final-report
[49] Crémer Report, supra note 26
[50] "Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations" issued by the Democratic Majority of the Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary of the U.S. House of Representatives", https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf (US Congress Report)
[51] Ibid, p. 6

In September 2021 the Federal Trade Commission (FTC), the US federal agency in charge of enforcing antitrust law, published a report analysing unreported acquisitions of the tech giants, i.e., Alphabet, Amazon, Apple, Facebook and Microsoft (GAFAM). In total 616 transactions carried out between 1st January 2010 and 31st December 2019 have been analysed by using the same research model as used by Cunningham.[52] According to the chairwoman of the FTC, this report highlighted the systematic nature of GAFAM acquisition strategies to buy out their way out of competing by acquiring start-ups, patent portfolios or teams of technologists.[53]

Conversely, Gautier and Lamesch reviewed 175 acquisitions carried out by GAFAM over the period 2015-2017 and concluded that only one acquisition, ie. Facebook / Masquerade in 2016, might be labelled as a killer acquisition.[54] However, as Régibeau points out this study suffers from a lack of conceptual clarity about what constitutes a killer acquisition and therefore it is suggested that this paper cannot be considered as reliable evidence.[55] Marc Ivaldi et al. in March 2023 published a study in which they examined twelve mergers in the information and communication technology (ICT) industry that were subject to scrutiny by the Commission.[56] They concluded that no factual evidence supporting the killer acquisition theory was found, indicating that under-enforcement is not present. Furthermore, they suggested that changes in competition policy concerning the digital sector may be based more on belief and intuition rather than empirical evidence.[57] It is important to note, however, that all the mergers reviewed in the study were subject to notification at least at the national level. Therefore, also this paper cannot be considered conclusive evidence that the "killer acquisition" issue is not a concern at all.

In summary, some data-driven acquisitions systematically avoid competition assessment because the targeted companies, such as digital start-ups, may possess substantial data but lack significant cash flow or turnover. Hence, these transactions are not scrutinized by competition authorities.[58] Despite some studies indicating the occurrence of killer acquisitions in the digital

[52] Ederer, 'Should Killer Acquisitions Be Banned?', supra note 40
[53] FTC Press Release of 15 September 2021, https://www.ftc.gov/news-events/news/press-releases/2021/09/ftc-staff-presents-report-nearly-decade-unreported-acquisitions-biggest-technology-companies
[54] Axel Gautier and Joe Lamesch, 'Mergers in the Digital Economy', *Information Economics and Policy* 54 (2021): p. 26–27.
[55] Régibeau, 'Killer Acquisitions?', p. 316, supra note 33
[56] Marc Ivaldi, Nicolas Petit, and Selçukhan Unekbas, 'Killer Acquisitions: Evidence from EC Merger Cases in Digital Industries', 2023.
[57] Ibid., p.20–21.
[58] Mats Holmström et al., 'Killer Acquisitions? The Debate on Merger Control for Digital Markets', *The Debate on Merger Control for Digital Markets*, 2018, p. 12; Régibeau, 'Killer Acquisitions?', 317., supra note 33

sector is not that common, consumers could still experience elevated prices, diminished product variety and quality, and potential privacy risks if such acquisitions remain unchecked.[59]

Pharma and digital are sectors where empirical research was carried out and where the occurrence of killer acquisitions was confirmed. However, the killer motive is likely not limited to them and other classical industries are endangered as well. For instance, Coca-Cola acquired Honest Tea in 2011. Honest Tea was producing an iced tea characterized by low calories and less sugar compared to their rival. Coca-Cola discontinued the Honest Tea in 2022 while focusing on Gold Peak and Peace Tea which are overlapping products.[60] This move was part of a greater shift in Coca-Cola's portfolio as announced in 2020.[61] Therefore, it could be argued that the incentive to kill the product was not anti-competitive. However, this example demonstrates that the killing scenario might be present also in other industries than pharma or digital.

To sum up, a typical target for a killer acquisition is a nascent or potential competitor that has an innovative product or technology that could challenge or disrupt the incumbent's market position in the future. Such a target may have a small market share or turnover, but a high growth potential or a strong patent portfolio. Hence, escaping the turnover-based notification criteria set out by the Merger Regulation. The incumbent may acquire the target to eliminate the threat of future competition by discontinuing the target's innovation projects or by discontinuing its own product in favour of the acquired product, thus endangering consumer welfare as one of the main objectives of EU competition law.

[59] Ederer, 'Should Killer Acquisitions Be Banned?', supra note 40
[60] https://consumergoods.com/why-coca-cola-discontinuing-honest-tea, accessed on 24th August 2023
[61] https://edition.cnn.com/2020/10/22/business/coke-zico-tab/index.html, accessed on 24th August 2023

Chapter II – market-share based thresholds

One of the alternative methods by which a competition authority can establish jurisdiction over a merger is through thresholds based on the market share of the merging entities. Spain and Portugal provide exceptional cases in Europe, employing market share-based thresholds in addition to turnover-based thresholds. Switzerland also uses a market share-based criterion alongside the turnover-based criteria. However, its approach differs from that in the Iberian Peninsula, as will be analyzed later. Lastly, we will analyze the practice employed in the United Kingdom, where, in addition to the turnover test, a share of supply test is used to determine the jurisdiction of the Competition and Markets Authority (CMA).

2.1 Spain and Portugal

A merger must be notified in Spain under two different circumstances. The first one relies on the turnover of the merging parties and the second one on the market shares. Notification is needed if a market share equal to or higher than 30 percent in the given relevant market is acquired or increased as a result of the merger unless the merger has an EU-dimension and must be notified at the European level.[62] However, if the turnover in the last accounting year or the assets acquired do not exceed the amount of 10 million euros, the merger has to be notified only if the market shares of the merging parties separately or jointly are equal or higher than 50% in any affected relevant market.

In its submission to the 2020 OECD Roundtable, Spain emphasized the efficacy of market-share thresholds in encompassing digital mergers that might have evaded notification under conventional turnover-based criteria. This assertion was exemplified through the Facebook/WhatsApp merger, where Spain's implementation of market-share-based thresholds facilitated the notifiability of the merger in Spain, contrary to its non-notifiable status under traditional turnover-based criteria.[63]

Portugal also utilizes a combination of turnover-based and market share-based thresholds to determine if a merger is notifiable or not. It must be notified if as a consequence of the merger a market share equal or higher than 50 percent in the given relevant market is created, acquired, or reinforced. However, if the created, acquired, or reinforced market share is below 50 percent

[62] Art. 8 of the Spanish Competition Act (*de Defensa de la Competencia*)

[63]Start-ups, killer acquisitions and merger control – Note by Spain
https://one.oecd.org/document/DAF/COMP/WD(2020)22/en/pdf

but equal to or higher than 30 percent, the obligation to notify arises only if the individual turnover of at least two merging parties registered in Portugal is higher than 5 million euros in the previous accounting year.[64]

Also, Portugal in its submission to the 2020 OECD Roundtable stated that it is likely that killer acquisitions would not escape the competition scrutiny if the market share-based thresholds are utilized. The merger of OLX/CustoJusto, two digital platforms whose merger was not notifiable under the turnover-based thresholds serves as an example.[65]

2.1.1 How to assess the market share of an undertaking in the EU

In the current regulatory framework within the EU, the evaluation of market share is conducted by the European Commission during various contexts, including the assessment of an undertaking's dominance under Article 102 of the TFEU or the evaluation of mergers under the provisions of the Merger Regulation. The assessment of an undertaking's market share entails a twofold procedure. Firstly, the delineation of the relevant market is undertaken. Subsequently, the quantification of the market share attributed to a specific undertaking is conducted.[66]

2.1.1.1 Relevant market

The relevant market comprises of relevant product market and relevant geographic market. A relevant product market is defined as a market comprised of all those products or services which are regarded as interchangeable or substitute by the consumer, because of the products' characteristics, their prices and their intended use.[67] Whereas a geographic as the name suggests describes an area where undertakings conduct business, and the conditions of competition are sufficiently homogeneous and can be distinguished from neighbouring areas where the conditions of competition are appreciably different.[68]

The primary objective of establishing the relevant market lies in elucidating the competitive boundaries that exert an influence on the concerned goods or services within the given market.[69]

[64] Art. 37, paragraph 1, letters a) and b) of the Portuguese Competition Act

[65]Start-ups, killer acquisitions and merger control – Note by Portugal https://one.oecd.org/document/DAF/COMP/WD(2020)28/en/pdf

[66] Commission Notice on the definition of relevant market for the purposes of Community competition law .OJ C 372, 9,12,1997 (Notice) , para. 2

[67] Ibid, para. 7

[68] Ibid., para. 8

[69] Gronden and Rusu, *Competition Law in the EU*, p. 23, supra note 42

The CJEU held that: "*a proper definition of the relevant market is a necessary precondition for any assessment of the effect of a concentration on competition*.[70]"

From this premise, two pivotal implications emerge. First, the assessment of a relevant market should be carried out in every merger case to assess the competitive effects of the merger. Second, this assessment is carried out by the Commission. However, the introduction of a market-share jurisdictional threshold at the European level would engender a fundamental alteration. While the first implication remains unaltered, the second undergoes a transformation. In this context, merging undertakings would be compelled to undertake an assessment of the relevant market prior to the initiation of the notification process. To discern the prospective obligations for undertakings, it is necessary to illuminate the Commission's approach to defining the relevant market in its proceedings.

The commission published the *Notice on the relevant market for the purposes of Community competition law*[71] *(*Notice) in 1997 and it is effective till today. One of the Notice objectives is to help undertakings while self-assessing their behaviour if is likely or not that the Commission would intervene in their specific case.[72] Considering a substantial time-period has elapsed since the adoption of the Notice, the European Commission undertook an evaluation of the Notice, with the outcomes disclosed in July 2021. One of the evaluative criteria was if the Notice is still relevant and if it continues to provide correct, comprehensive, and clear guidance. In general, it was concluded that the Notice still serves its purpose. However, it emerged that certain advancements pertinent to market definitions in swiftly evolving domains, such as digital markets or multi-sided markets characterized by services offered at a zero-monetary cost, were inadequately addressed in the Notice.[73] Hence, in November 2022, the Commission released a draft of a revised Market Definition Notice[74] (Draft Notice). Notably, this revised version significantly extends beyond the original Notice in length[75] and reflects the market development over the past decades. In the following paragraphs, both the Notice and the Draft Notice are going to be utilized to analyse how the relevant markets are assessed at the European level to

[70] Judgement of 31 March 1998, French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission of the European Communities, C-68/94 and C-30/95, EU:C:1998: 148, para. 143

[71] Notice, supra note 64

[72] Ibid, para. 5

[73]Evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law of 9 December 1997, SWD/2021/0199 final, para.31

[74] Draft of the Commission Notice on the definition of the relevant market for the purposes of Union competition law (Draft Notice), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6528

[75] The original notice contained 58 paragraphs, the draft notice contains 113 paragraphs.

illustrate what the merging undertakings would have to undergo should the market-share-based threshold be introduced in the EU.

2.1.1.1.1 What shall be considered while defining relevant markets?

While conducting business the undertakings face three main sources of competitive constraints: (i) demand substitutability, (ii) supply substitutability and (iii) potential competition.

The most important competition constraint is demand substitutability. It refers to the degree to which consumers consider one product or service as a viable alternative to another when making purchasing decisions. In essence, it reflects the extent to which customers are willing to switch from one product to another in response to changes in price, quality, or other relevant factors.[76] The CJEU sees this as "*the most immediate and effective disciplinary force on the suppliers of a given product (...) the most effective assessment criterion*[77]*"* while defining the relevant market.

The second competition constraint is supply substitutability which pertains to the interchangeability of production inputs or resources that can be used to create a particular product or service. It denotes the extent to which producers can in a short time and without incurring significant additional costs switch from using one input to another in response to changes in availability, cost, or other relevant factors.[78]

The last one is potential competition, and it pertains to those competitors who are not yet in the market but can enter the market in the near future. However, potential competition is not considered by the Commission while assessing the relevant market and might be considered in the follow-up stage, i.e., the competitive assessment, of the merger.[79]

2.1.1.1.2 How to define the relevant product market

When defining the relevant product market, it must be established which products are regarded as interchangeable. If they are interchangeable, they belong to the same product market. Supply substitutability is considered only if the constraining influence of supply substitution across a spectrum of products equals that of demand substitution in terms of efficacy and immediacy.[80]

[76] Notice, para. 15, supra note 64; Draft Notice, para. 28-29, supra note 72

[77] Judgment of 4 July 2006, easyJet v Commission, T-177/04, EU:T:2006:187, para. 99

[78] Notice, para. 20, supra note 64

[79] Notice. para. 24, supra note 64

[80] Draft notice, para. 34, supra note 72

Let us first take a look at the demand substitutability. If there is a deterioration in the supply conditions of the given product to which products and to which extent would the customers of the given undertaking switch? That is the question to be answered[81].

The first step is to assess products by their objective specifications, i.e., their characteristics, price, intended use and preferences of customers. However, that is just an indication of interchangeability and other parameters important for the customer´s choice such as, e.g., the product´s durability or sustainability need to be identified as well.[82] As the CJEU held: "*interchangeability or substitutability is not assessed solely in relation to the objective characteristics of the products and services at issue. There must also be taken into consideration the conditions of competition and the structure of supply and demand on the market.* [83] *"*

Another piece of useful evidence might be evidence on past or hypothetical substitution. Evidence on past substitution is useful in situations where the shift stems from changes in the relative supply conditions such as product unavailability. Whereas evidence on hypothetical substitution is useful in cases, especially when a forward-looking assessment is desired, i.e., on markets with the presence of pipeline products[84] such as the pharmaceutical market. These pipeline products can either be part of an existing relevant market of together with its substitutes form a new future relevant market.[85]

It is imperative to account for industry-specific competitive constraints, customer switching barriers, and associated costs. Acquiring this data is often accomplished through the utilization of marketing studies and consumer surveys.[86]

Finally, quantitative tests could be used by the Commission such as the SSNIP test. SSNIP stands for: "small but significant non-transitory increase in price". If a change in price ranging from 5 to 10 percent cause the customer to switch to another product, those products belong to the same market.[87] However, in a highly concentrated market a "*cello-phane fallacy*" might occur and it can lead to the wrong market definition.[88] Another drawback pertains to its

[81] Draft notice, para. 29, supra note 72
[82] Ibid, para. 12 and 49, supra note 72
[83] Judgement of 30 January 2020, Generics (UK) Ltd and Others v Competition and Markets Authority, C-307/18, EU:C:2020:52, para. 129
[84] Draft notice, para.16, 54 and 90, supra note 72
[85] Draft notice, para. 90, supra note 72
[86] Ibid, para. 56 and 57, supra note 72
[87] Gronden and Rusu, *Competition Law in the EU*, p. 24, supra note 42
[88] Ibid.

applicability within digital marketplaces, primarily because consumers are not obligated to pay a fee for the delivery of services.[89] Nonetheless, the SSNDQ (small but significant non-transitory decrease of quality) could be used instead.[90]

When considering supply substitutability, the type of evidence employed resembles that utilized when evaluating demand substitutability; nonetheless, it's important to note that in this context, customer perspectives do not factor into the assessment.

2.1.1.1.3 How to define the relevant geographic market

A geographic market could range from a local to a worldwide market.[91] As already mentioned, the goal is to define an area where the conditions of competition are sufficiently homogenous. The Commission scrutinizes the demand substitution patterns, similar to defining product substitutability, drawing insights from customer preferences.[92] However, it is important to emphasize that geographic market delineation is not exclusively reliant on this factor. The Commission may rely on a diverse array of evidence.

Market shares and prices guide the market borders.[93] Homogeneous competition conditions exist when customers across different areas trade with similar suppliers with comparable market shares and pricing. Further examination delves into the underlying reasons.

Customer purchasing behaviour, notably their geographic buying patterns, is pivotal. If customers across the EU access suppliers under uniform conditions regardless of Member State, the relevant market likely spans the entire EU.[94]

Supplier considerations are vital, factoring in barriers and costs related to serving diverse areas, including regulatory requirements. High barriers and costs that deter or prohibit supply to a specific area exclude it from the relevant geographic market.[95]

For certain markets, the distance from supplier to customer and associated factors like transportation costs and accessibility time assume significance. The concept of catchment areas aids in delineating the relevant geographic market.[96]

[89] John M. Newman, ‘Antitrust in Zero-Price Markets: Applications’, *Wash. UL Rev.* 94 (2016): p. 65.
[90] Katarína Kalesná, ‘Relevant Market-Digital Challenges’, *Bratislava Law Review* 7, no. 1 (2023): p. 83–84.
[91] Notice, para. 51, supra note 64
[92] Draft Notice, para. 42 and 68, supra note 72
[93] Ibid, para. 64
[94] Ibid, para. 70
[95] Ibid, para. 71-72
[96] Ibid, para. 73-74

2.1.1.1.4 How to gather the evidence

As it was illustrated above there is a wide variety of evidence which can be utilized while defining the relevant market. Nonetheless, there is no rigid hierarchy of evidence[97] and the Commission has a margin of assessment in market definition.[98] This does not mean that the Commission can act arbitrarily. On the contrary, the evidence used must be reliable.[99]

Some of the presented evidence consists of publicly available information or can be easily gathered by undertakings. Consumer surveys or marketing studies can be conducted by both competition authorities or by undertakings. However, it must be borne in mind that the interests of both are divergent. The aim of competition authorities is to protect the competition, aim of undertakings is to make a profit. Therefore, also the Commission stressed out that the methodology used in consumer surveys or marketing studies conducted by undertakings would be scrutinized with utmost care.[100]

The Merger Regulation confers several investigative powers on the Commission. It may issue a written request for information in the form of a simple request or by a decision and the non-compliance with such request in penalised.[101] It may even request internal documents from undertakings. However, as noted by the CJEU: "*the Commission may exercise the powers conferred on it by Article 11 of Regulation No 139/2004 only to the extent that it considers that it is not in possession of all the information necessary to enable it to decide on the compatibility of the concentration concerned with the common market.*[102]*"* Even though the Commission is limited in using this article, it has at least this power, unlike undertakings. Even stronger power is enshrined in article 13 of the Merger Regulation, the power of inspection including the right to enter the undertaking´s premises or to interview "*any person who may be in possession of useful information.*[103]*"* Undertakings are again not conferred upon with this power.

The market definition process is characterized by a wide array of potential evidence sources, and the Commission exercises discretion in their utilization. Nevertheless, this discretion is bounded by the requirement for evidence to meet rigorous standards of reliability. While some

[97] Judgment of 11 January 2017, Topps Europe Ltd v European Commission, T-699/14, EU:T:2017:2, para. 82

[98] Richard Whish and David Bailey, '1. Competition Policy and Economics', in *Competition Law* (Oxford University Press), p. 27, accessed 17 August 2023, https://www.oxfordlawtrove.com/display/10.1093/he/9780198836322.001.0001/he-9780198836322-chapter-1.

[99] Draft Notice, para. 77, supra note 72

[100] Notice, para. 41, supra note 64

[101] Merger Regulation, articles 11 and 14

[102] Judgment of 4 February 2009, Omya AG v Commission of the European Communities, T-145/06, EU:T:2009:27, para. 28

[103] Merger Regulation, recital 38

evidence can be gathered by both competition authorities and undertakings, the divergence in their objectives necessitates careful scrutiny of methodologies, particularly in activities like consumer surveys and marketing studies. The Commission benefits from specific powers conferred by the Merger Regulation, including the ability to request information and conduct inspections, which provide it with a distinctive investigative toolkit compared to undertakings.

2.1.1.2 Market shares

After the completion of the first phase, i.e., the definition of the relevant product and geographic market, the second phase takes place. The Commission first identifies all suppliers and customers in the identified relevant markets and then calculates the market shares of each supplier.[104]

Market share is usually calculated based on sales or purchases by customers of relevant products in the given geographical market.[105] Nevertheless, in certain market contexts, sales data may not be the most suitable indicator for computing market shares. This may occur due to the prominence of other factors in determining market dynamics or because a particular undertaking within the market does not engage in any sales activities. In those situations, other indicators such as the number of active users, the number of visits, the number of downloads or the volume of transactions concluded over a platform might be used.[106]

The Commission usually relies on the market share estimates of undertakings complemented with, e.g., public studies or reports. However, in some cases, the Commission might conduct a market reconstruction through the use of its investigative powers enshrined in the Merger Regulation.[107]

2.1.2 Amendment of the Merger Regulation incorporating the market-share-based threshold

Having delineated the methodology for computing market shares of merging undertakings, the next step is to propose the structure and parameters of a relevant jurisdictional threshold. The primary inquiry pertains to the determination of the appropriate triggering threshold for market share.

[104] Draft Notice, para. 104, supra note 72

[105] Ibid, para. 104-106

[106] Ibid, para. 107

[107] Ibid, para. 110

The starting point is the recital 32 of the Merger Regulation. It provides that if the market share of a merging undertaking is not higher than 25 %, such a merger would likely not be liable to significantly impede the competition. Furthermore, the Commission uses market shares threshold in various documents, i.e., Commission notice on a simplified treatment for certain concentrations,[108] Horizontal Merger Guidelines[109] or Non-horizontal Merger Guidelines[110]. Those documents might be summarized that a vertical merger creating a market share below 30% is likely compatible with the internal market.[111] In cases of horizontal merger, the "*safe harbour*" is again 25%.[112] Furthermore, the Horizontal Merger Guidelines provide that a merger resulting in market share between 40 % and 50 % and in some cases below 40 % might lead to the creation or strengthening of the dominant position.[113] Therefore it can be suggested, that the threshold might be set at higher than 30% for vertical and conglomerate mergers and higher than 25% for horizontal mergers.

The more intriguing inquiry lies in, where the market share shall be reached so that the rule is compatible with the principle of subsidiarity. If the relevant geographic market is the whole EU, then the answer is easy. The question remains what to do if the merging undertakings are not active in the whole EU and the relevant market is either national or comprised of several Member States.

The referral mechanism contained in article 4 paragraph 5 serves as a potential source of inspiration. According to this article, in cases where a merger qualifies for notification in a minimum of three Member States, the merging undertakings might ask the Commission to review their merger. This provision implies that if the market of three or more Member States might be affected by the merger, it may be advantageous to subject such a merger to scrutiny at the European level. Thus, the provision adapting the market share-based threshold into the Merger Regulation Article 1 might be worded as follows:

"*A concentration that does not mean the thresholds laid down in paragraph 2 or 3 has a Community dimension where:*

[108] Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, OJ C 366, 14.12.2013

[109] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004 (Horizontal Merger Guidelines)

[110] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18.10.2008 (Non-horizontal Merger Guidelines)

[111] Ibid, para. 25

[112] Horizontal Merger Guidelines, para. 18, supra note 107

[113] Ibid, para. 17

(a) *as a consequence of the concentration a market share higher than 30% on the relevant product market at a European level or in at least 3 Member States is created, acquired, or reinforced in the case of a vertical or conglomerate concentration; or*

(b) *as a consequence of the concentration a market share higher than 25% on the relevant product market at a European level or in at least 3 Member States is created, acquired, or reinforced in the case of a horizontal concentration."*

2.1.3 Critical analysis of the proposed market-share-based amendment

2.1.3.1 Effectiveness criteria

As established in the first chapter of this thesis a typical target for a killer acquisition would often be a start-up possessing some innovative product or service. These innovations often engender a competitive threat to entrenched market incumbents. In cases of the digital market examples of established players are the GAFAM companies who according to the US Congress Report[114] were involved in killer acquisition scenarios. It was further ascertained that entities targeted in killer acquisitions exhibit a notable characteristic of possessing minimal or, in some instances, no turnover. Thus, these targets do not trigger the turnover-based EU thresholds which require all parties involved in a merger to possess a predetermined level of turnover. If a market-share threshold is employed, only one of the parties involved in a merger may activate the threshold. E.g., if undertaking A possessing a 30 percent market share intends to acquire undertaking B whose market share is just 0,5 percent and which is active in the same relevant market, such a transaction is notifiable under the market share-based threshold and likely would not be notifiable under the turnover-based threshold.[115]

Both the Spanish and Portugal solutions adopt an exception to the rule based on the turnover or assets of the merging parties. Even though, both countries believe that such a setting can catch potential killer acquisition, it can be argued especially in cases where targets have no turnover, that the chosen solution is not as effective as it could be without such exception. Therefore, the proposed amendment discussed in this thesis omits such exceptions and instead places sole reliance on the market shares of the merging parties.

[114] US Congress Report, p. 6, supra note 50

[115] Based on the assumption that an undertaking with a 0,5 % market share would not achieve the turnover required by the Merger Regulation.

Even though, market shares do not reflect the market power of undertakings,[116] which is ultimately one of the key factors assessed in the competition analysis of a proposed merger, it can serve as in indication of market power.[117] Therefore, in the jurisdictional phase, it can serve as a good indicator of whether a proposed merger would significantly impede the competition or not and is comparatively more accurate than other notification criteria.[118]

The effectiveness of the market-share threshold lies heavily on the definition of the relevant market. As underscored by Šmejkal, should the relevant market be narrowly defined, and the acquiring entity lacks a presence within that specific market, such an acquisition would not necessitate notification.[119] However, the motive behind a killer acquisition is to pre-empt future competition meaning that the acquirer is already present or is at least developing a product which is likely to enter the same relevant market as the target. If the acquirer is neither present nor intends to enter the relevant market, it can be argued that such a scenario is not a killer acquisition but a standard way to enter a new market. Nonetheless, even such a scenario might pose competitive risks as vertical integration may lead to the creation of a closed ecosystem which may significantly impede free competition.

To sum up, the proposed market share-based threshold could serve as an effective way to assert jurisdiction over killer acquisition as it leaves little space for low-turnover mergers to escape the scrutiny of the national authority as is the case of Spain or Portugal. At the same time, the notification threshold is designed sufficiently high to avoid overburdening both undertakings and the Commission by reporting acquisitions which are unlikely to significantly impede the competition.

2.1.3.2 Predictability

As previously demonstrated, calculating market shares is a highly intricate process that involves a wide array of evidence. At first, the relevant market must be defined. Under the current EU regime in a vast majority of merger cases, the relevant market is not defined at all as it is not

[116] Louis Kaplow, 'Market Share Thresholds: On the Conflation of Empirical Assessments and Legal Policy Judgments', *Journal of Competition Law and Economics* 7, no. 2 (2011): p. 244.

[117] Morten Broberg, 'Improving the EU Merger Regulation's Delimitation of Jurisdiction: Re-Defining the Notion of Union Dimension.', *Journal of European Competition Law & Practice* 5, no. 5 (2014): p. 265.

[118] OECD (2016), Local Nexus and Jurisdictional Thresholds in Merger Control, para. 49, https://one.oecd.org/document/DAF/COMP/WP3(2016)4/En/pdf

[119] Václav Šmejkal, 'CONCENTRATIONS IN DIGITAL SECTOR - A NEW EU ANTITRUST STANDARD FOR "KILLER ACQUISITIONS" NEEDED?', *Journal for the International and European Law, Economics and Market Integrations* 7, no. 2 (December 2020): p. 7, https://doi.org/10.22598/iele.2020.7.2.1.

needed.[120] Moreover, even when it comes to defining the relevant market undertakings normally advocate for a wider definition of the market which results in a lower market share.[121] Therefore, if a market-share-based threshold is adopted, it is probable that disputes between merging undertakings and the Commission will arise. These disputes can lead to prolonged proceedings and increased costs for all parties involved, making the regulatory process slower and expensive.

Furthermore, the OECD stressed out that notification thresholds should be based: "*on information that is readily accessible to the merging parties.*[122]*"* However, sales and other sensitive data are treated as confidential by undertakings and most likely would not be disclosed willingly to the merging parties.[123] Moreover, should they be disclosed a danger of infringement of article 101 of the TFEU emerges. Undertakings unlike the Commission lack the necessary investigative powers to lawfully obtain such information.

Spain admitted that the market share-bases threshold brings uncertainty for merging parties. However, it argues that a pre-notification recommendation and existing case-law should reduce such uncertainty.[124] While it can be agreed that the pre-consultation mitigates the uncertainty, the usefulness of the old case law might be disputed as market evolution, especially in the digital sector is very dynamic. The Notice and Draft Notice of the Commission should also decrease the uncertainty of undertakings. However, they still present only general guidelines in the form of a non-binding soft-law document and as noted by Broberg: "*it is impossible to calculate an incontestable market share figure on the basis of general guidelines.*[125]*"*

Consider a scenario where, following the application of these tools, the Commission determines that a merger must be notified. Conversely, the merging undertakings, believing their merger doesn't require notification, proceed to finalize the merger. In this situation, since the Commission's conclusion is not legally binding at this stage, it would likely initiate an infringement procedure, the outcome of which remains uncertain. Such a process would impose substantial costs on both the Commission and the undertakings involved. This situation of uncertainty and potential legal disputes could be avoided by implementing more precise and

[120] Gronden and Rusu, *Competition Law in the EU*, p. 356, supra note 42
[121] Ibid.
[122]OECD (2016), para. 12, supra note 116
[123] Broberg, 'Improving the EU Merger Regulation's Delimitation of Jurisdiction', p. 266, supra note 117
[124] Start-ups, killer acquisitions and merger control – Note by Spain, supra note 63
[125] Broberg, 'Improving the EU Merger Regulation's Delimitation of Jurisdiction', p. 265, supra note 117

certain criteria for merger notification. That this is not mere speculation is confirmed by the analysis of the experience from the Iberian Peninsula below.

On the other hand, it could be argued that undertakings already calculate their market shares under current EU competition rules in various contexts, such as cases of dominance, and block-exemptions, when advocating for the simplified merger procedure or even in case of notifying the merger. However, these situations differ in that other factors come into play. In cases of dominance, conduct rather than market share is the determining factor. In cases of block-exemptions or simplified procedures, miscalculating market share may result in the inapplicability of said rules. The implementing regulation No 802/2004 requires the merging undertakings to *inter alia* indicate the affected markets and their corresponding market shares. However, the Commission is the one who has the final say. In contrast, with merger notification, the consequences of incorrectly assessing market share in the jurisdictional phase could be much more direct and severe, i.e., if the Commission believes that a particular merger should have been notified and it was not, the undertaking concerned could face a fine up to 10% of the aggregate turnover.[126]

In light of this analysis, it becomes evident that a market share-based threshold falls short of meeting the requirement of predictability. Its implementation would likely lead to protracted processes and increased costs for both undertakings and the Commission. As such, it may not be suitable for making the initial determination of whether a transaction should be subject to notification.[127]

2.1.3.3 EU dimension

The proposed solution requires that the relevant geographic market is either EU-wide or at least three Member States are affected. Thus, the requirement of the EU dimension is fulfilled. Also, the OECD notes that: "*market shares are well suited to establish local nexus*."[128]

[126] Article 14, paragraph 2 of the Merger Regulation
[127]OECD (2016), para. 15, supra note 116
[128] Ibid., para. 49

2.1.4 How do the Spanish and Portugal competition authorities deal with the unpredictability of the market share-based threshold?

Some may call it a "Gun Jumping Mania"[129], and others a pure enforcement of applicable law, the fact remains that in recent years not only the Commission initiated so-called "gun-jumping" procedures. It refers to a situation when a merger is implemented without adhering to the stand-still obligation, i.e., before the clearance from the competition authority.

This trend also vividly influenced the practise of both Spanish and Portuguese competition authorities, i.e., the Spanish National Markets and Competition Commission (CNMC) and the Portuguese Competition Authority (PCA). Specifically, there has been a conspicuous upswing in the incidence of gun-jumping cases within these jurisdictions. This phenomenon can plausibly be attributed to the utilization of market share-based thresholds, which introduce an element of uncertainty for the merging parties.

Since 2016 one of the PCA priorities has been to monitor unnotified mergers, a stance reaffirmed in the latest Competition Policy Priorities.[130] The first time the market-share-based threshold was utilized in Portugal led to a violation of the stand-still obligation resulting in a costly fine. The merger of two hospitals was notifiable pursuant to the market-share threshold. however, the merging entities failed to duly notify the merger until after the PCA had initiated an investigation into their merger. Ultimately, although the merger was granted clearance, the entities were adjudicated and subsequently fined a sum amounting to EUR 155.000.[131]

Also, in Spain instances of detected gun-jumping are increasing.[132] The Spanish National Court[133] shed light on circumstances when a fine might be imposed. The market definition and corresponding market shares must be proved beyond any reasonable doubt otherwise a fine cannot be imposed.[134] Furthermore, undertakings must conduct a reasonable market assessment

[129] Tânia Luísa Faria and Margot Lopes Martins, 'Pre-Closing Competition Law Issues: How to Overcome the Gun Jumping Mania and Other Competition Law Risks: Pré-Closing Em Sede de Operações de Concentração: Como Ultrapassar a Gun Jumping Mania e Outros Riscos de Direito Da Concorrência.', *Actualidad Jurídica (1578-956X)*, no. 54 (January 2020): p. 186.

[130] 'Competition Policy Priorities for 2023', accessed 19 September 2023, https://www.concorrencia.pt/sites/default/files/Competition%20Policy%20Priorities%20for%202023.pdf.

[131] 'AdC Fines Hospital Particular Do Algarve for Gun-Jumping', Autoridade da Concorrência, accessed 19 September 2023, https://www.concorrencia.pt/en/articles/adc-fines-hospital-particular-do-algarve-gun-jumping.

[132] 'Gun Jumping: Record Fine Imposed by the CNMC', Cuatrecasas, accessed 19 September 2023, https://www.cuatrecasas.com/en/global/competition-eu-law/art/gun-jumping-record-fine-imposed-by-the-cnmc.

[133] Judgement of the Spanish National Court (*Audiencia Nacional*) of 28 September 2012, *Bergé*, No. 3736/2012

[134] Alberto Escudero Puente, 'The Spanish National Court Annuls a Fining Decision in a Gun-Jumping Case (Bergé)', *E-Competitions Bulletin*, no. September 2012 (28 September 2012), https://www.concurrences.com/en/bulletin/news-issues/september-2012/ES-M10-Berge-%CC%81-3736-2012-28-09-12.

based on the previous case-law and cannot be held liable if a new market definition which could have not been foreseen is employed by the CNMC.[135] In other words, the undertaking must exercise reasonable due diligence when deciding not to notify.

The duty of due diligence was recently confirmed by the CNCM in the Albia decision.[136] The decision underscores the necessity for sufficient evidence justifying any departure from established case-law.[137] Furthermore, it was also stressed out that undertakings have the possibility of pre-merger voluntary consultation with the CNMC.[138] However, it is noteworthy that the decision not to avail of this consultation mechanism does not, in and of itself, constitute negligence nor does it serve as an aggravating factor in subsequent proceedings.[139]

The aforementioned decision practise mainly focused on mergers within conventional economic sectors, such as healthcare provision, real estate, or funeral services. In these sectors, undertakings often had the benefit of established case-law to guide their actions. However, as markets become increasingly dynamic, the challenge of precisely delineating them becomes more intricate, and the applicability of the previous case law diminishes in relevance. Moreover, most of the mergers were cleared. What happens, however, if the merger is anticompetitive? Undertaking could be fined and ultimately ordered to dissolve the merger, however, depending on the timing the anticompetitive effects might be irreversible. Spain and Portugal did not have to deal with this situation, so the question remains open.

Nonetheless, their experience shows that the use of market share-based thresholds leads to higher costs associated with gun jumping procedures. These costs are not inevitable. Should more objective notification criteria be used, the danger of such costs decreases.[140]

2.1.5 Overall assessment of the proposed market-share-based threshold

It can be concluded that the market-share-based threshold offers benefits in addressing killer acquisitions, especially in the ability to catch them compared to the turnover threshold. Nonetheless, its implementation may lead to uncertainty, legal disputes, and increased costs for both undertakings and the Commission as is confirmed by the experience from Spain and

[135] Merger Control, Fifth Edition, edited by Nigel Parr and Catherine Hammon, published by Global Legal Group, p. 184, https://www.uria.com/documentos/colaboraciones/1868/documento/GLI-MC5_Spain.pdf?id=6435_en

[136] Decison of the CNMC of 29 June 2022, *ALBIA/TANATORIO DE MARÍN, SNC/DC/092/22*

[137] Ibid, para.68

[138] Ibid, para. 72

[139] Ibid, para. 82

[140] It does not mean that gun jumping procedures are not carried out in jurisdictions with turnover-based thresholds, but the chances are lower.

Portugal. Overall, it is argued that introducing such a threshold would lead to more harm than good. This view is shared with the French competition authority which has ruled out the introduction of such a test into the French legal system because of its uncertainty. [141]

2.2 Switzerland

As indicated at the beginning of this chapter, let us shed light on the merger control regime in Switzerland. Within the Swiss legal framework, the Carlet Act,[142] specifically articulated in Article 9, incorporates not only the conventional notification threshold reliant on turnover but also integrates an additional criterion. A merger must be notified if one of the merging undertakings was found by a final and non-appealable decision dominant on the Swiss market and the merger concerns either that market, its upstream or downstream market or an adjacent market. Notably, there is no time limit meaning that the dominant undertaking has to notify unless the competition authority decides otherwise, i.e., strips the undertaking of its dominant position by decision.[143]

Notwithstanding that this provision does not constitute a straightforward market share-based threshold akin to the approaches adopted in Spain or Portugal, it remains inherently connected. A significant market share is a pre-condition for attaining the status of a dominant undertaking.

2.2.1 Upstream, downstream, and adjacent market

In accordance with the Swiss framework, the obligation of dominant undertakings to notify mergers is not applicable across the board but rather restricted to mergers taking place within specific market categories, namely, upstream, downstream, and adjacent markets. While the definitions of the former two categories are relatively unambiguous and easily delineated, the latter, which pertains to adjacent markets, may introduce complexities and potential challenges.

An upstream market refers to a stage in the production or supply chain where goods or services are provided to companies that are further downstream. It typically involves suppliers or producers of components, raw materials, or intermediate goods. In contrast, a downstream market is where finished products or services are sold to end-users or consumers. The key

[141] Start-ups, killer acquisitions and merger control – Note by France, para. 20. https://one.oecd.org/document/DAF/COMP/WD(2020)16/en/pdf

[142] Federal Act on Cartels and other Restrains of Competition of 6 October 1995 (Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen)

[143] Benoît Merkt and Stéphanie Buchheim, 'Switzerland', in *Merger Control Worldwide*, 2nd ed., Antitrust and Competition Law (Cambridge: Cambridge University Press, 2012), p. 1366, https://doi.org/10.1017/CBO9781316134078.062.

distinction is that upstream markets are closer to the beginning of the supply chain, while downstream markets are closer to the end where consumers make purchases.[144]

A recent judgement of the CJEU may serve as an example. A Lithuania company Lietuvos geležinkeliai AB is active in the railway industry which is active in two markets. First, it is managing railway infrastructure which is owned by the Lithuanian state, that is the upstream market. Second, it provides rail transport services, which is the downstream market.[145]

An adjacent market can be described as a "*neighbouring but separate market.*"[146] However, this definition does not provide the much-needed clarity. The Swiss Federal Administrative Court decided a case in 2014 where the definition of an adjacent market was at issue.[147] The acquirer was found to be dominant in a market for ebauches, ie., unfinished clockwork, and acquired a company producing watch cases.[148] This acquisition was not notified to the competition authority who subsequently started a proceeding for breaching the notification obligation. The lower court understood the adjacent market as a market of products that are to some extent substitutes to the product of the dominant market and whose demand runs in parallel. Thus, an adjacent market is a market of complementary products.[149] However, the Federal Court did not agree and held that such a conclusion is too extensive and contravenes the legal certainty of merging parties and concluded that an adjacent market is a market of products whose demand runs in parallel in such a way that those products are sold or purchased in a bundle essentially limiting the reach of the dominant criterion.[150]

2.2.2 Amendment of the Merger Regulation incorporating the dominance criterion

The Merger Regulation could be amended as follows:

"*Notwithstanding paragraphs 2 or 3, a concentration has a Community dimension where one of the concerned undertakings was found to be dominant pursuant to article 102 of the Treaty on the Functioning of the European Union by a final and non-appealable decision and the*

[144] Miguel S. Ferro, 'Product Market', in *Market Definition in EU Competition Law* (Edward Elgar Publishing, 2019), p. 161, https://www.elgaronline.com/display/9781788118385/11_chapter6.xhtml.

[145] Judgment of 12 January 2023, Lietuvos geležinkeliai AB v European Commission., C-42/21 P, EU: C:2023:12, para. 8 and 33

[146] Decision of the European Commission of 27 June 2017, Google Search (Shopping), AT.39740, para. 334 and 649

[147] Judgement of the Swiss Federal Aminidstrative Court (*Bundesverwaltungsgericht)* of 29 April 2014, The Swatch Group AG v Wettbewerbskommission WEKO, BVGer B-6180/2013

[148] Ibid, para. A. and B.

[149] Ibid, para. 2.3

[150] Ibid, para. 2.3.1.2

concentration concerns the market where the dominance was established or its upstream, downstream or an adjacent market, unless the dominant undertaking was declared to be relieved of the notification obligation by a decision of the European Commission."

The proposed provision would be inserted into Article 1 of the Merger Regulation which defines the scope. Additionally, the incorporation of definitions for pertinent terms such as "upstream market," "downstream market," and "adjacent market" would be imperative.

As illustrated the definition of upstream and downstream markets is uncontroversial, however definition of an adjacent market is the opposite. Should the restrictive interpretation carried out by the Swiss Federal Court be incorporated, it would make the provision less effective in capturing all relevant mergers. Hence, the interpretation put forward by the lower court should be preferred. Consequently, an adjacent market would be defined as: "*A market where products which are to some extent substitute to products of the dominant market and whose demand runs in parallel constitutes an adjacent market. A market of complementary products is an adjacent market as well.*"

As already stated, the Swiss provision does not contain any time limit. The proposed EU version follows this example; however, undertakings should be given the possibility to be stripped of this duty by a decision of the Commission. This decision could be issued only after the dominant undertaking presents sufficient evidence to the Commission that it is no longer dominant in the particular market.

2.2.3 Critical analysis of the proposed dominant-based amendment

2.2.3.1 Effectiveness

First of all, it should be noted that the dominant criterion cannot serve as the only jurisdictional threshold but rather serves as a complementary threshold. Nonetheless, it is argued that such a criterion can be an effective way to capture killer acquisition.

There is one significant reason for such a conclusion. If an undertaking was found to be breaching the competition rules i.e., abusing its dominant position, it is likely that such undertaking could be engaged in other anticompetitive activities such as pursuing a merger boosted by an anticompetitive motive. This behaviour is commonly described as recidivism. Connor conducted a study about recidivism in antitrust cases and concluded that: "*Recidivism* *appears to be increasing rapidly*."[151] It must be noted, however, that Connor describes recidivism when an undertaking is convicted for a second time regardless of the timing of the second conviction. Conversely, EU bodies require an adoption of a decision declaring the first infringement prior to the commitment of the second infringement to qualify as recidivism, Connor does not.

Hence, the proposed amendment can serve as a good tool to scrutinize mergers of an undertaking whose mergers are more likely to be driven by an anti-competitive motive.

2.2.3.2 Predictability

The level of predictability hinges predominantly upon the definition of the affected markets. With the introduction of the proposed amendment, a potential source of ambiguity arises concerning the precise characterization of a complementary product. However, this ambiguity could be eliminated through informal discussions with the Commission.

Now it could be argued that the same could be employed under the market share-based threshold, however, delineating relevant markets and corresponding market shares is much more complex than deciding whether a product or service is complementary or not.

2.2.3.3 EU Dimension

The proposed amendment ensures that the desired local nexus is established as only undertakings found dominant under Article 102 of the TFEU are obliged to notify their concentration. Prerequisites of applying Article 102 are *inter alia* dominance on the internal market or a substantial part of it and effect or potential effect on the trade between Member States. Consequently, the obligation to report mergers is limited to undertakings operating within markets that extend beyond a local market.

2.2.4 Overall assessment of the dominant-based criterion

Building upon the preceding analysis, the introduction of this complementary threshold represents a potentially efficacious means by which the Commission can assert jurisdiction over mergers that might otherwise escape its scrutiny, including those that could qualify as killer acquisitions. However, it would not solve the issue completely as only undertakings designated as dominant would have this obligation to notify their mergers. Another drawback is that some

[151] John M. Connor, 'Recidivism Revealed: Private International Cartels 1991-2009', *SSRN Electronic Journal*, 2010, p. 2, https://doi.org/10.2139/ssrn.1688508.

terms used in the provision are ambiguous. This ambiguity can be, however, eliminated through informal discussions with the Commission. Such discussion would not be as burdensome as in the case of market share-based criterion, thus, not significantly increasing costs of both undertakings and the Commission.

2.3 UK

Rules pertaining to merger control are contained in the Enterprise Act 2002 (Enterprise Act) in its Part 3. Whereas most merger control systems are based on mandatory notification, the UK system is one of the few exceptions. It is up to the merging undertakings if they decide to notify or not. Consequently, there is no stand-still obligation, and no penalties might be imposed for completing a non-notified merger.[152] Nonetheless, UK legislation also contains jurisdictional tests[153] which might be used by the CMA to assert jurisdiction over a transaction and the CMA may issue an interim measure prohibiting the completion of a merger, thus, invoking a de facto stand-still obligation.

The Enterprise Act contains two jurisdictional tests. The first is a classical turnover test meaning that if certain turnover thresholds are met, the CMA might assert jurisdiction. The second one is known as a "share of supply test" and the UK is the only jurisdiction to use this jurisdictional test.

The share of supply test enables the CMA to assert jurisdiction over mergers which falls short of the turnover test but at the same time is capable of hindering the competition. This statutory purpose was confirmed in a recent judgement by the Competition Appeal Tribunal in the Sabre / Farelogix merger.[154]

2.3.1 Share of supply test

This test is met if the merging undertakings supply or acquire 25 % or more of goods or service of a particular description in the UK or in a substantial part of it. Moreover, as a result of the merger, there must be an increment in the supply notwithstanding the size of it.[155]

[152] Richard Whish and David Bailey, '22. Mergers (3): UK', in *Competition Law*, by Richard Whish and David Bailey (Oxford University Press, 2021), 964, https://doi.org/10.1093/he/9780198836322.003.0022.

[153] Article 23 of the Enterprise Act 2002

[154] Judgement of the Competition Appeal tribunal of 21 May 2021, *Sabre Corporation v Competition and Markets Authority*, 1345/4/12/20

[155] Even an increment "*very substantially below 0.1 %*" is enough; Decision of the Office of Fair Trading (predecessor of the CMA) of 14 July 2009, *Tesco / Spar store in Wroughton,* ME/4162/09, para. 16

At first sight, it seems that this test is analogous to the market share test, however, it is not true. Under the share of supply test, a relevant market does not need to be defined as: "*the share of supply test need not relate to an economic market, and the Act does not require the basis on which jurisdiction is asserted and the substantive competitive assessment to be linked.*[156]*"* Thus, the UK system is very flexible and as *Smith* and *Hunt* argue it is capable of catching killer acquisitions.[157]

2.3.1.1 Goods and services of a particular description

The CMA enjoys significant discretion[158] in determining the scope of goods or services to include when employing the share of supply test, as the Enterprise Act does not lay down any restrictions in this regard, nonetheless, it does not mean that the CMA may act arbitrarily, it must act reasonably.[159] Hence, merging parties may challenge the rationality of the CMA´s approach.[160]

When the considered goods or services are either the same or very similar and belong to the same economic market, then the test is undoubtedly met.[161] This resembles the analysis of interchangeability when defining the relevant product market. However, the Enterprise Act does not require this. The CMA may aggregate goods and services of merging undertaking even when they are not interchangeable and do not belong in the same economic market. This would be done especially in cases of novel products and services where no previous case law is available to the CMA, thus, the CMA must use estimates and presumptions.[162]

A good example is the merger of ICAP and EBS. ICAP, the acquirer, was an undertaking active in the wholesale market for over-the-counter derivatives, fixed-income securities, precious metals, money market products, foreign exchange, energy, credit and equity derivatives and was the largest inter-dealer broker.[163] The target, the EBS was active in the market of provision of electronic inter-dealer broker services mainly to the spot foreign exchange trading

[156] Decision of the Office of Fair Trading of 24 March 2009, *NBTY Europe Limited / Julian Graves Limited*, ME/3887/09, para. 15

[157] Stephen Smith and Matthew Hunt, 'Killer Acquisitions and PayPal/iZettle', *Competition Law Journal* 18, no. 4 (2019): p. 163.

[158] Paragraph 23, subparagraph 8 of the Enterprise Act 2002

[159] "Mergers: Guidance on the CMA's jurisdiction and procedure" from January 2021 (amended on 4 January 2022), para. 4.59, b), https://www.gov.uk/government/publications/mergers-guidance-on-the-cmas-jurisdiction-and-procedure

[160] Sabre v CMA, para. 142, supra note 154

[161] Jonathan Parker and Adrian Majumdar, *UK Merger Control*, Second edition (Oxford [England]: Hart Publishing, 2020), p. 88.

[162] Ibid., p. 89.

[163] Decision of the Office of Fair Trading of 20 June 2006, *ICAP plc / EBS Group Limited*, ME/2367/06, para. 1

community.[164] The turnover test was not met, thus, the predecessor of the CMA, the Office of Fair Trading (OFT), asserted jurisdiction based on the share of supply test. It was concluded that the test was met in relation to the supply of spot foreign exchange or precious metal inter-dealer broker services.[165] After the competitive assessment, it was concluded that the undertakings were not direct pre-merger competitors, thus, not operating on the same relevant market and the merger was ultimately cleared.[166] This case confirms that products or services of merging undertakings do not have to be part of the same relevant market in order to meet the test.

2.3.1.2 A vertical merger cannot be caught by virtue of the share of supply test

The CMA procedural guidelines provide that the test cannot be applied to purely vertical situations with no overlaps between the products or services of merging parties.[167] However, the CMA has asserted jurisdiction over mergers which at first sight looked like a vertical merger finding a horizontal overlap in the activities of merging parties. This approach can be illustrated in the following case.

In 2006 the OFT investigated a merger of Montauban S.A. and Simon Group plc. Montauban provided the supply of short-sea unitised freight shipping, whereas Simon was the owner and operator of two port facilities in the UK.[168] Furthermore, Montauban was part of Cobelfret Group, thus, forming an associated person pursuant to paragraph 127 of the Enterprise Act. Part of this group were also companies which owned ports in the UK.[169] They were part of one undertaking in the EU legal terms.

Essentially it was a merger of a customer, i.e., Montauban, and a provider of services, i.e., Simon.[170] Hence, Montauban argued that their actives are not over-lapping and the share of supply test is not met.[171] However, the OFT reached a different conclusion. The considered services were the supply of stevedoring services which were naturally provided by Simon to third parties but also provided by members of Cobelfret Group to other members of this group,

[164] Ibid, para. 2
[165] Ibid, para. 4
[166] Ibid, para. 58 and 63
[167] Procedural guideline of the CMA, para 4.59, c), supra note 159
[168] Decision of the Office of Fair Trading of 2 August 2006, *Montauban / Simon Group Plc*, ME/2500/06, para. 1 and 3
[169] Ibid, para. 2
[170] Parker and Majumdar, *UK Merger Control*, p. 90, supra note 161
[171] Montauban / Simon Group Plc, supra note 168, para. 6

inter alia, to Montauban. Thus, the test was met as there was an increment in the supply of stevedoring services.

This case further shows that the CMA may take into consideration also activities which are not provided on the merchant market, i.e., to third parties, but only to members of the same undertaking.[172]

2.3.1.3 The particular goods or services do not have to be marketed

It may seem that in order to meet the share of supply test, services and goods have to be marketed, i.e., third parties or other members of one undertaking can actually procure the goods or services. However, a recent decision[173] of the CMA illustrates that a merger of one company active on the market and another company which is still developing its products may still meet the share of supply test.

Both undertakings were active in the supply of preventive treatments for congenital Haemophilia A. Roche had a finished product which was already marketed to customers, whereas Spark was developing two Haemophilia A treatments and these products have not yet passed all phases of clinical testing, i.e., they were pipeline products.

The CMA concluded that competition exists among manufacturers of Haemophilia A treatments, even prior to the completion of all clinical testing phases for their respective products. Consequently, the CMA deemed Spark to be actively involved in the provision of Haemophilia A treatments within the United Kingdom, thereby satisfying the requisite conditions of the share of supply test.[174]

This case shows that the CMA will consider the whole life cycle of a product and it will not require an overlap in directly marketed products. This approach might be particularly helpful in cases of killer acquisitions where the target may have an innovative but not yet marketed product.

2.3.1.4 How to calculate and allocate the supply of particular goods or services

After the particular goods or services are established, the CMA must calculate if the 25 percent threshold is met. The CMA again enjoys wide discretion, it may apply any reasonable criterion

[172] Parker and Majumdar, *UK Merger Control*, p. 91, supra note 161
[173] Decision of the Competition and Markets Authority of 16 December 2019, *Roche Holdings, Inc / Spark Therapeutics, Inc,* ME/6831/19
[174] Ibid., para. 4

such as value, cost, price, quantity, capacity, and number of workers employed.[175] In most cases, the relevant criterion would be value or volume.[176]

2.3.1.5 Digital Markets, Competition and Consumers Bill

The current share of supply test requires an overlap in the activities of the merging parties, thus, essentially only horizontal mergers are caught.[177] Thus, the UK government believes that it is time to amend the current jurisdictional thresholds and introduce the Digital Markets, Competition and Consumers Bill (Digital Bill) which *inter alia* introduces a new jurisdictional threshold.[178]

The introduction of this novel threshold, which focuses on the acquirer, eliminates the necessity for overlaps in business activities. It establishes that the CMA may assert jurisdiction over a merger if the acquirer has a share of supply higher than 33 percent,[179] alongside an annual turnover exceeding £350 million, provided that the target maintains a substantial nexus with the UK. The target´s UK nexus requirement is satisfied if it qualifies as a UK-based business, engages in operational activities within the UK, or supplies goods or services in the UK. As the explanatory note explains the purpose of this bill is to provide*: "a more comprehensive and effective jurisdictional basis for certain vertical and conglomerate mergers, in particular acquisitions that may reduce dynamic competition and risk the development of new products or services.*[180]*"* In essence, while not explicitly stated, the underlying purpose of this legislation is to capture killer acquisitions.[181] It is presumed that the introduction of this new threshold would bring two to five cases per year in the scrutiny of the CMA.[182]

2.3.2 Amendment of the Merger Regulation incorporating the share of supply test

The foregoing analysis showed that the share of supply test is indeed very flexible and enables the CMA to assert jurisdiction over mergers which do not trigger the turnover threshold. However, as already stated the ratio behind the UK merger control is different compared to the

[175] Article 23, paragraph 5 of the Enterprise Act 2022

[176] Parker and Majumdar, *UK Merger Control*, p. 87, supra note 161

[177] With the exception described above.

[178] "*Digital Markets, Competition and Consumers Bill",* Bill 350 2022-23, https://bills.parliament.uk/bills/3453

[179] The threshold was set at 25% in the initial proposal.

[180] "*Digital Markets, Competition and Consumers Bill – explanatory notes",* Bill 294 EN 2022-23, https://publications.parliament.uk/pa/bills/cbill/58-03/0294/en/220294en.pdf

[181] Bill Batchelor et al., 'UK Revamps Antitrust Rules With Broader Jurisdictional Reach, Tougher Penalties and More Flexible Procedure for Merger Control', n.d., https://www.skadden.com/insights/publications/2022/04/uk-revamps-antitrust-rules-with-broader-jurisdictional-reach

[182] "*Digital Markets, Competition and Consumers Bill: Impact Assessment - Reforms to Merger Control",* p. 31, https://publications.parliament.uk/pa/bills/cbill/58-03/0294/ImpactAssessmentAnnex3.pdf

EU. The EU relies on mandatory notification of merging parties and the suspensory regime, i.e., if the merger is notifiable, it cannot be executed till it is approved.

Whereas the UK system rests on a voluntary notification and non-suspensory regime which is complemented with the CMA´s prerogative to assert jurisdiction over mergers stemming from the share of supply test.

The advantage of the flexibility inherent in the share of supply test would, paradoxically, emerge as its most substantial drawback should it be integrated into the EU merger control regime. Such inclusion would lead to even heightened uncertainty of merging undertakings, even higher than in the case of a pure market share test. Hence, a hybrid regime[183] is proposed which would keep the mandatory notification based on the turnover criteria with the corresponding stand-still obligation which would be complemented with voluntary notification should the merging parties believe that the share of supply test is met. Furthermore, the Commission will have the ability to intervene and assert jurisdiction over a completed merger if it believes that the share of supply test is met. However, this prerogative would not be limitless and the Commission would have 4 months to intervene after the merger was made public or the Commission learned about it. This time limitation follows the UK example where the CMA also has 4 months to intervene.[184]

The percentage limit is proposed to be at 25 per cent[185] without the requirement of overlapping activities following the solution proposed in the Digital Bill but adhering to the initially proposed 25 per cent threshold.[186]

Incorporating the share of supply test as a jurisdictional test for mandatory notification could be worded as follows:

"(1) Where a concentration involves two or more undertakings that have a combined share of supply of goods or services of any description exceeding 25 % within the European Union or if one of the merging undertakings has a share of supply of goods or services of any description exceeding 25 % within the European Union before the concentration and the other undertaking

[183] There was a proposal in the UK to amend the voluntary regime to a hybrid one. For details see: Gabi Olson-Welsh, "Mandatory Notification and the Proposals by the Department of Business Innovation and Skills: Is a Hybrid Approach the Way Forward?," Competition Law Journal 11, no. 2 (2012).p 135.

[184] Enterprise Act 2002, paragraph 24, subparagraph 1

[185] The same arguments which were used above when discussing the threshold for a market share-based threshold could be used.

[186] 'UK Antitrust Shakeup Would Increase Merger Scrutiny, Broaden Investigative Powers and Create New Oversight of Big Tech', n.d., https://www.skadden.com/-/media/files/publications/2021/07/uk-antitrust-shakeup/ukantitrustshakeupwouldincreasemergerscrutinybroad.pdf?rev=a275a3b4bdfe46b2935dc2f85085a0be

is present in the EU, the Commission shall have the authority to assert jurisdiction over such concentration.

(2) Notwithstanding paragraph (1) of this provision, the Commission cannot assert jurisdiction over a concentration if such merger is already being reviewed or was reviewed by a competition authority of a Member State unless this authority decides to refer the concentration to the Commission.

(3) The Commission cannot assert jurisdiction over concentration after 4 months have passed from the moment the concentration was made known to the Commission.

(4) A concentration is made known to the Commission if:

(a) the concerned undertakings informed the Commission and provided relevant information enabling the European Commission to decide if the conditions of paragraph (1) of this provision are met, or

(b) the European Commission learned about the concentration from other means and concerned undertakings if requested, provided relevant information enabling the European Commission to decide if the conditions of paragraph (1) of this provision are met.

(5) After the Commission informs the concerned undertakings by a decision that it is asserting jurisdiction over the concentration, the concentration cannot be executed until it has been declared compatible with the common market pursuant to a decision under Articles 6(1)(b), 8(1) or 8(2), or on the basis of a presumption according to Article 10(6).”

In connection with the amendment of the Merger Regulation, the Commission would need to concurrently release comprehensive guidelines elucidating the practical application of the share of supply criterion in its enforcement procedures.

2.3.3 Critical analysis of the proposed share of supply amendment

2.3.3.1 Effectiveness

This criterion enables the Commission to exercise a remarkable degree of innovativeness and operational flexibility, as vividly demonstrated in the analysis of the decision-making practices of the CMA. It endows the Commission with the authority to consider whatever description of goods or services it deems reasonable. Moreover, no thorough economic analysis needs to be carried out to define the relevant goods and services which vividly contrast with the market share-based approach where such analysis is necessary.

Moreover, this test holds particular promise within the pharma sector, wherein mergers often involve undertakings with products still in development stages, which may represent a pipeline product. The merger of Roche / Spark serves as a compelling illustration of how the share of supply test could be effectively used in the pharma sector.

Another notable advantage of this threshold pertains to its capacity to capture mergers involving well-established undertakings such as GAFAM acquiring small yet innovative start-ups. In such scenarios, the threshold can be met by the acquirer alone, provided its share of supply exceeds the twenty-five percent benchmark.

2.3.3.2 Predictability

Since the incorporation of this criterion would change the mandatory regime to a hybrid one the danger of being fined for gun-jumping is essentially decreased. Merging undertakings are required to be explicitly informed by a Commission decision indicating that jurisdiction has been asserted over their merger based on the share of supply test. Should they decide to proceed despite this decision, it cannot be argued that they did so because of uncertainty as it could have been argued in the case of the market share test. Moreover, the Commission is limited by time to use this power.

On the other hand, the undertakings should be given a chance to self-assess if their merger could meet the share of supply test. This can be facilitated through an informal communication channel with the Commission. In parallel, the Commission would also need to release comprehensive guidelines elucidating the practical application of the share of supply criterion in its enforcement procedures.

Furthermore, it is up to the Commission to decide if it asserts jurisdiction or not, implying that such assertion should only occur in cases where the Commission harbours apprehensions regarding potential anticompetitive motives underlying the merger. This discretion ensures that the Commission focuses its regulatory efforts on those mergers where there is a legitimate concern about their impact on competition saving costs on both sides.

Some might argue that the introduction of such a threshold essentially allows the Commission to review any merger if the Commission is sufficiently inventive in applying the test. Nevertheless, it is essential to underscore that the Commission's discretion, while substantial, is not limitless. The Commission must act reasonably.

Moreover, the current interpretation of Article 22 of the Merger Regulation engenders even greater uncertainty, as it permits referrals even in cases where the merger is not notifiable in any Member State. In contrast, the share of supply test provides merging undertakings with a measure of predictability, enabling them to engage in some form of assessment. This stands in stark contrast to the Article 22 procedure, which offers no such guidance or assessment opportunity if their merger does not meet the national notification criteria.

2.3.3.3 EU Dimension

To ensure that this test is not overused, the entire EU is chosen as the benchmark. It essentially allows the Commission to assert jurisdiction over a merger which is significant enough to be reviewed at the European level. As an illustrative example, consider a merger involving two pharmaceutical companies:

Undertaking A possesses an already-marketed product which treats lung cancer and is an already entrenched player in the European Market supplying more than 40 per cent of lung cancer treatments within the EU. However, this treatment necessitates multiple doses and is associated with significant adverse side effects. Undertaking B is in the process of developing an innovative lung cancer treatment that, in contrast to Undertaking A's product, is devoid of side effects and requires only a single dose for efficacy. Undertaking A aware of this development decides to acquire Undertaking B with the intention to shut down the development of the concurrent treatment after the acquisition, thereby safeguarding their strong market position.

Notably, while Undertaking B may have limited turnover, owing to the developmental stage of its product, a merger of these two undertakings would likely trigger neither a national nor European notification threshold. However, under the share of supply test, jurisdiction over such a merger might be asserted and this merger is significant enough to be scrutinized at the European level as the introduction of Undertaking B's treatment could potentially benefit lung cancer patients across the entire EU.

However, should such a merger trigger a national notification threshold, the Commission cannot assert jurisdiction over such a merger unless the competent national authority decides to refer the merger to the Commission.

2.3.4 Overall assessment of the share of supply test

In summary, the share of supply test offers the Commission an effective and innovative tool for merger control. Its flexibility proves particularly advantageous, notably within sectors like pharmaceuticals, where mergers frequently involve undertakings with products still in developmental stages.

Changing the system to a hybrid one reduces the risk of fines for gun-jumping in cases when the jurisdiction is asserted on the basis of this test. While it leaves undertakings with some level of uncertainty, such uncertainty can be mitigated through the utilization of informal pre-merger consultations and the provision of comprehensive guidelines published by the Commission. Importantly, the Commission's discretion ensures a balanced approach ensuring that only mergers where a plausible anticompetitive motive is present are scrutinized.

By choosing the entire EU as the benchmark, this test safeguards against overuse, focusing on mergers of European significance while preserving the Commission's ability to act when necessary.

Chapter III – value-based threshold

Though the term killer acquisition was first introduced in 2018, the changes which were brought about by the boom of digital markets have been, however, noticed by the competition authorities also before 2018. The German Monopoly Commission published its 68th Special Report in 2015. It discussed *inter alia* the merger system employed in Germany and the EU. They concluded that the then system was not sufficiently effective and advocated for the introduction of a value-based notifying threshold both at the German and European levels.[187] Subsequently, in 2017 the German legislator introduced the value-based threshold. Neighbouring Austria did the same and also amended its merger control law. Thus, in both countries, a merger is notifiable to competition authorities if *inter alia* the consideration for the acquisitions exceeds 400 million EUR in Germany and 300 million EUR and the target has substantial activities in Germany or in Austria.[188] Both the German and Austrian models also employ a turnover-related criterion which either focuses solely on the domestic turnover as is the German case or on a worldwide turnover of merging undertakings as is the Austrian case.

Outside the EU also other countries which traditionally relied on the turnover-based criteria were aware of this issue, notably India. The Indian Competition Law Review Committee published its report in July 2019. It was advocated for the introduction of a new complementary threshold based on the value of the deal.[189] Subsequently, the Indian Competition Act was amended, and a value-based threshold was introduced.[190] A criterion used to establish the sufficient local nexus follows the German and Austrian example and requires, that the target has substantial business operations in India. However, the Indian model does not employ any turnover-related criterion.

Given the inherent variability in transaction pricing, wherein predetermined fixed prices are seldom established prior to the transaction itself, such as when undertaking A commits to pay 100 million Euros for the acquisition of 100% of shares in undertaking B, and given that the final consideration typically comprises various components, some contingent upon future and

[187] Monopolkommission, Sondergutachten 68: "Wettbewerbspolitik: Herausforderung digitale Märkte", para. 452, 460 and 461, https://www.monopolkommission.de/images/PDF/SG/SG68/S68_volltext.pdf (Monopolkommission 2015)

[188] Section 35, subsection 1a of the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen – GWB*), Section 9, subsection 4 of the Austrian Federal Cartel Act (*Bundesgesetz gegen Kartelle und andere Wettbewerbsbeschränkungen*)

[189] "*Report of the Competition Law Review Committee*", Ministry of Corporate Affairs, Government of India, https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf

[190] The Competiton Act, 2002, section 5

uncertain events, the first question which comes into mind is what constitutes the value of the transaction and how it should be calculated?

Another not less important question is when the requirement of sufficient domestic activities is met and hence, when does the merger have to be notified? The experience from Germany, Austria and India will be analysed to answer these questions.

3.1 How to calculate the value of the deal

As the German and Austrian economies are closely interconnected the respective national competition authorities published in 2018 joint guidelines[191] which were updated in 2022 (**Updated Guidelines**).[192]

The Indian competition authority published its draft regulation in September 2023[193] (**Draft Indian Regulation)** which among other things deals with the question of what shall be considered when computing the value of a deal.

Pursuant to the Updated Guidelines the value of consideration consists of "*all assets and other monetary benefits that the seller receives from the buyer in connection with the merger in question."*[194] Whereas the Draft Indian Regulation provides that the value of consideration shall include: "*every valuable consideration, whether direct or indirect, immediate or deferred, cash or otherwise*."[195]

Under both documents also all future payments such as earn-out clauses have to be included in the calculation. However, under the German and Austrian model future payments must be discounted to their present value,[196] the Indian explicitly provides for the opposite.[197] On one hand, the exclusion of any discounting of future payment makes the calculation of the deal value simpler and more certain for both merging business and competition authorities. On the

[191] "Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification", https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.html?nn=3590338

[192] Leitfaden Transaktionswert-Schwellen für die Anmeldepflicht von Zusammenschlussvorhaben (§ 35 Abs. 1a GWB und § 9 Abs. 4 KartG), https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Leitfaden/Leitfaden_Transaktionsschwelle.html?nn=3590338 (Updated Guidelines)

[193] „The Competition Commission of India (Combinations) Regulations, 2023", https://www.cci.gov.in/images/stakeholderstopicsconsultations/en/draft-combinations-regulations1693891636.pdf (Draft Indian Regulation)

[194] Updated Guidelines, para. 11, supra note 192

[195] Draft Indian Regulation, section 4, subsection 1, para. 1, supra note 193

[196] Updated Guidelines, para. 30, supra note 192

[197] Draft Indian Regulation, section 4, subsection 1,explanation, letter (a), supra note 193

other hand, discounting future payments provides for a more precise valuation of the deal. The introduction of such discounting mechanisms may give rise to disputes when merging entities and competition authorities arrive at differing outcomes in their valuation assessments. Nonetheless, the German and Austrian experience has not shown that such disputes have occurred. However, it can be argued that for the sake of legal certainty not discounting future payments serves as the better option.

Another issue while determining the value of a transaction arises when the acquirer buys shares in the target not in a single step, but rather through a series of subsequent steps. The Draft Indian Regulation states clearly that any acquisition of shares in the target carried out two years prior to the merger is deemed as a single merger.[198] In contrast, neither the Updated Guidelines nor the respective law, provide any binding time limit but emphasize that each case has to be assessed individually to ascertain if individual acquisitions are closely connected in material terms and timing to be regarded as a single merger. Hence, if a merger consisting of more individual acquisitions forms from an economic point of view a single transaction which is capable of influencing the market structure, such a merger is regarded as a single merger. and not even contrary intention of merging parties play a role.[199] Again, it can be argued that the Indian choice provides more clarity to merging parties as it sets a set time frame as to what constitutes a single merger and what does not.

What both approaches have in common is, however, that if the precise value of a deal cannot be determined with reasonable certainty merging parties should consider the merger to be notifiable.[200] Competition authorities may even start gun-jumping procedures if they believe that the explanation provided by merging undertakings relating to the value of the deal is not plausible.[201]

The precise calculation of a deal's value is a task that is notably more complex than it may initially appear. Nevertheless, competition authorities provide useful guidelines that serve to mitigate this complexity and associated uncertainties. Furthermore, as the body of case law continues to expand, the certainty of merging will naturally increase as well. The Indian

[198] Ibid, section 4, subsection 1, explanaiton, letter (e)
[199] Judgement of the Düsseldorf Higher Regional Court (*Oberlandesgericht Düsseldorf*) of 23 August 2017, *Fusionsuntersagung EDEKA/Tengelmann*, VI-Kart 5/16 (V), para. 27
[200] Draft Indian Regulation, section 4, subsection 1, explanation, letter (g), supra note 193
[201] Updated Guidelines, para. 19, supra note 192

solution, however, provides more certainty to merging businesses as to what and how to consider when calculating the deal value.

3.2 What constitutes significant local activities

To trigger the notification threshold the target must have significant local activities within Germany, Austria or India. What constitutes such activities? The answer can be found in the case law and in guidelines provided by the relevant authorities.

Since in India, a little time has passed since the introduction of the value-based threshold into their legal order, no case law is available at the moment.. However, the Draft Indian Regulation provide three scenarios in which the local nexus is met. The first scenario, evidently targeting digital undertakings provides that if at any point within the twelve months prior to the merger, the number of target´s users, subscribers, customers, or visitors in India constitutes 10% or more of its total global user base, the target has significant local activities. The other two scenarios which could be applied to undertakings non-active in the digital economy provide that either if the target´s turnover in India during the preceding financial year is 10% or more of its total global turnover or if the gross merchandise value over twelve months prior to the mergers is 10 % or more of its global gross merchandise value,[202] such undertaking has significant activities in India.[203] On one hand, it makes the assessment of domestic activities more predictable as undertakings know which criteria to employ. On the other hand, it is questionable if such a criterion would capture, i.e., acquisitions of pharmaceutical start-ups whose product is still in clinical trials.

Germany and Austria follow another route and do not list indicators in their law to assess domestic activities. The Updated Guidelines provide that domestic activities must have a market orientation.[204] This does not necessarily mean that they have to be monetized as some services might be provided for other considerations such as data. These activities have to be measured based on a quantifiable indicator which might vary across economic sectors. Moreover, the assessed activities have to be current as opposed to anticipated and are measured at the moment the merger is to be put into effect.

[202] Cash, receivables, or other consideration either for or facilitating, sale of goods and/ or provision of services by the undertaking on its own, as an agent or otherwise

[203] Draft Indian Regulation, section 4, subsection 2, supra note 193

[204] Updated Guidelines, para. 65 and 76, supra note 192

The mere presence of existing activities is not enough to trigger the value-based threshold. Such activities must reach a significant local level. To measure the significance various indicators might be employed such as market share. Should the market share be higher than 10%, such activities would be considered significant.[205] Target´s turnover also serves as an indicator of significance. Should the turnover be below EUR 17.5 million in Germany or EUR 1 million in Austria, the target´s activities would be considered to be insignificant. Nonetheless, this applies only if the turnover adequately reflects the target´s market position and competitive potential.[206] These examples may serve as good indicators in classic markets. However, in novel markets such as digital or innovative-prone markets such as pharma other indicators could be used.

The Updated Guidelines give the competition authorities wide flexibility, especially when assessing the local activities, however, these are only preliminary conclusions which have to either be confirmed or rejected by judicial authorities.

The Düsseldorf Higher Regional Court narrowed the room for manoeuvre of competition authorities when assessing the criterion of significant local activities in its recent judgement in the merger of Meta and Kustomer.[207]

3.2.1 Meta / Kustomer

Meta, formerly known as Facebook, is a large undertaking active mainly in the field of social media and online advertising. Kustomer was a small innovative US-based undertaking active in the customer service and support customer relationship management software market known as CRM.

After Meta decided to acquire Kustomer, the merger was not notifiable on the European level, however, it met the Austrian value-based threshold. The merger was referred to the Commission via the Article 22 mechanism. This Request was joined by other Member States and the merger was ultimately cleared subject to conditions.[208] However, the Bundeskartellamt, the German competition authority (BKA), did not join the request and decided to investigate the merger on its own.

[205] Ibid

[206] Ibid, para- 82-83

[207] Judgement of the Düsseldorf Higher Regional Court (Oberlandesgericht Düsseldorf) of 23 November 2022, META/Kustomer, Kart 11/21 (V) (Meta/Kustomer judgement)

[208]Press release of the European Commission of 27 January 2022, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_652

During the investigation, the BKA *inter alia* issued a declaratory statement[209] that the merger was notifiable in Germany as the value-based threshold was met. Eventually, the merger was cleared.[210] Nonetheless, merging undertakings believed that the merger was not notifiable in Germany as Kustomer did not have significant activities in Germany. Thus, they filed an appeal to the Düsseldorf Higher Regional Court against decisions issued by the BKA during the investigation of the merger.

Kustomer did not have any German subsidiary or branch and it also possessed neither German assets nor had any German employees.[211] It generated its turnover only from licensing its software to other customers.[212] However, the BKA was of the view that Kustomer had significant activities in Germany. Firstly, Kustomer had customers located in Germany and it also processed data sets of German end consumers.[213] However, Kustomer processed this data on behalf of its customers, i.e., Kustomer licensed its software to Business A and subsequently processed the data of Business A customers. Thus, there was no contractual relationship between Kustomer and end consumers whose data was processed. The BKA established that this activity was domestic because of the origin of the data.

Nonetheless, the court held that Kustomer had no significant activity in Germany, thus, the merger was not notifiable.[214] The court agreed that Kustomer had German customers, however, the number of German customers was not significant enough to trigger the notification.[215] Processing data of German end customers which was done abroad is not a domestic activity.[216]

Further, the court shed light on the interpretation of domestic activities. If a service is provided, the location of the customers or users is decisive.[217] The focus lies on the location where the activity is carried out, not on the effects of the activity. A contrary interpretation would go against the will of the legislator to determine a criterion which could be assessed with reasonable effort by merging parties.[218]

[209] Decision of the Bundeskartelamt of 09 December 2021, Meta/Kustomer, B 6 – 37/21

[210] Press release of the Bundeskartelamt of 11 February 2022, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/11_02_2022_Meta_Kustomer.html;jsessionid=0F9DBE53694EA7A7666F184F0EABF686.1_cid362?nn=3591568

[211] Meta/Kustomer judgement, para. 7, supra note 207

[212] Ibid, para. 6

[213] Ibid, para. 9

[214] Ibid, para. 64

[215] Ibid, para. 65

[216] Ibid, para. 66

[217] Ibid, para. 67

[218] Ibid, para. 68

Moreover, the court questioned whether the €17.5 million should have been employed. This threshold was not used in this case as according to the BKA the turnover of Kustomer did not reflect its market position and competitive potential. It stems from the court´s reasoning that this threshold should be employed in cases of "*mature*"[219] markets. It argued that the CRM markets has been known since the 1980s.[220] Nonetheless, the court did not give any final verdict regarding this.

The court also affirmed that the criterion in question is focused on current activities. Thus, future activities are not to be taken into account. [221]

Furthermore, the courts assessed which other indicators might be used to assess domestic activities. Using market shares as a suitable indicator is questionable as it cannot be easily determined.[222] However, number of direct customers can be used as an indicator.[223] Unfortunately, the court refrained from issuing a definitive ruling on whether it is sufficient if the acquired undertaking whose customers are located abroad has employees or facilities in Germany.[224]

This judgement rejected the extensive interpretation of significant domestic activities employed by the BKA and advocated for a more business-friendly model as it emphasized the need for clarity for merging undertakings. On the other hand, it affirmed some of the BKA conclusions published in the Updated Guidelines.

3.3 Amendment of the Merger Regulation incorporating the value-based threshold

The introduction of the value-based threshold at the European level is not a novel thing. As noted by the commissioner Vestager the most significant difficulty with the value-based threshold is to set it at the appropriate level as "*if it's too high, it doesn't really help – you still end up missing a lot of the cases that matter. On the other hand, if you set it* low *enough to make sure that you see all those mergers, you risk making companies file a lot of cases that simply aren't relevant.*[225]*"* Vestager stressed out the burden put on undertaking if the bar is set

[219] Ibid, para. 75; The court used word „*reifer*" which could be translated as mature.
[220] Ibid
[221] Ibid, para. 76
[222] Ibid, para. 81
[223] Ibid, para. 82
[224] Ibid, para. 87
[225] Speech Margrethe Vestager, supra note 15

too low. However, also the Commission would have to handle more cases which would cost time and resources. A minority of stakeholders who advocated for the introduction of the value-based threshold during the public consultation on the evaluation of the EU merger system also emphasized that the threshold should be set sufficiently high.[226]

Over the years there were multiple proposals on where the bar should be set. As early as 2015 the German Monopoly Commission proposed a threshold set at €5 billion.[227] In the EU Evaluation Report,[228] a high-value transaction was deemed to be if the consideration exceeds €1 billion or €5 billion. The €1 billion threshold reflects a ratio that is fourfold the EUR 250 turnover threshold requirement enshrined in Article 1, paragraph 2, letter b) of the Merger Regulation.[229] Following the fear that a too-low bar would cause too many unproblematic mergers to be notified the proposal suggests working with the EUR 5 billion threshold. Nonetheless, the precise determination of the threshold would necessitate a complex analysis, which falls beyond the scope of this thesis.

One of the main arguments opposing the introduction of the value-based threshold was that this threshold does not ensure sufficient local nexus.[230] It follows the concern of the OECD which stated that the value-based threshold is "*unsuitable to determine whether a transaction will have an impact on a specific jurisdiction.*"[231] However, this concern could be limited by following the example of other jurisdictions employing value-based thresholds with the introduction of the significant European activities requirement.

As some sort of flexibility is needed when employing this jurisdictional test, it is advocated to follow the German example and not stipulate the indicators in a statute as done in India. An undertaking would have significant European activities if it has significant activities in 3 or more Member States or if it is active on the European market as a whole.[232]

Another question is whether to complement such a criterion with an additional turnover-based criterion. Germany employs the EUR 17,5 turnover threshold which should filter out non-

[226] "Summary of replies to the Public Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control", July 2017, https://ec.europa.eu/competition/consultations/2016_merger_control/summary_of_replies_en.pdf (Summary of Public Consultation 2016)
[227] Monopolkommission 2015, supra note 187
[228] EU Evaluation Report, supra note 5
[229] Ibid, p. 31, footnote 130
[230] Summary of Public Consulation 2016, supra note 226
[231] OECD (2016), para. 53, supra note 116
[232] When presenting the rationale for the inclusion of three Member States as a reference point, please refer to Chapter II, Section 2.1.2, which addresses the introduction of market share-based thresholds.

problematic transactions. This limit, however, has an effect if the turnover reflects the market position and competitive potential of the target. That is another uncertainty which would have to be solved by merging undertakings. Thus, such a mechanism is not proposed. The Austrians, moreover, require a certain level of worldwide and domestic turnover. Also, the Monopoly Commission in its 2015 proposal worked with a turnover-related criterion complementing the value-based threshold and required a certain level of turnover accumulated in the EU. These turnover criteria may limit the notified cases, hence, lowering the administrative burden. The drawback of such a solution is that some potentially competitive significant mergers may escape scrutiny. Such a scenario could be illustrated in the following scenario.

US-incorporated undertaking A active in the pharma business with no EU activities whatsoever decides to acquire a promising European start-up which is developing rival products. The start-up has, however, not yet entered the market as all of its developing products are in phase III of the clinical trials and is seeking approval from the European Medicines Agency.[233] Undertaking A is willing to pay more than EUR 5 billion. Under the German and Austrian model, it would be questionable if such a merger is notifiable. However, under the Indian model, as there is no turnover-related criterion, such a merger would be notifiable without question. Hence, the proposal follows the Indian example and does not stipulate any turnover-related criterion and works only with the value and the criterion of significant European Activities. The provision adapting the value-based threshold could be worded as follows:

"*A concentration that does not mean the thresholds laid down in paragraph 2 or 3 has a Community dimension where the consideration for the merger exceeds EUR 5 billion and the undertaking to be acquired has significant European business activities."*

Provisions defining what constitutes consideration and significant European activities would have to be inserted as well and can be worded as follows:

"*Consideration entails all valuable considerations which the acquirer provides to the other party in connection with the concentration notwithstanding if such consideration is immediate or deferred or it is contingent upon happening any uncertain event in the future*.

An undertaking has significant European business activities if it has significant business activities in 3 or more Member States or if it is active on the European market as a whole."

[233] If a company is already in phase III of clinical trials such activity may be considered to be marketable and the criterion of significant domestic activities should be fulfilled (see para. 79 and 105 of the Updated Guidelienes, supra note 192).

3.3.1 Critical analysis of the proposed value-based threshold

3.3.1.1 Effectiveness criteria

In January 2021 a report that *inter alia* evaluated German experience with the value-based threshold was published.[234] It was concluded that the value-based threshold had the expected effect as mergers from innovative-prone industries were assessed including cases when targets have low or no turnover. Surprisingly, the majority of scrutinized mergers, 45 percent, were from the pharma sector and only 13 percent from the digital sector.[235] Pharma was identified as one of the sectors which are prone to killer acquisitions. Nonetheless, no killer acquisition was identified based on this threshold.[236]

Moreover, the acquirer's willingness to pay a high price for an acquisition is a good indicator of the competitive potential of the target. As noted by Holmström it does not necessarily mean that the acquirer has an anticompetitive motive.[237] Nonetheless, the value of the transaction may help to identify those mergers which should be scrutinized.[238]

On the other hand, some authors argue that a general value-based threshold might be an "overkill".[239] However, the German experience shows that the number of notifiable mergers did not increase overwhelmingly after the implementation.[240]

While market shares or turnover are not something which might be agreed on by the merging parties, the value of the deal is. Thus, one of the major drawbacks of such a threshold is that merging parties may agree on a price which is just below the notification threshold to escape the scrutiny of the competition authority. This was also stressed by Cunningham who concluded that: "*killer acquisitions appear to routinely avoid regulatory scrutiny by acquiring entrepreneurial ventures at transaction values below the HSR review thresholds.*"[241]

To sum up, the value-based threshold as shown by the German and Austrian experience is a suitable tool to assert jurisdictions over mergers which would otherwise escape the merger

[234] „Bericht gemäß § 18 Absatz 8 und § 43a des Gesetzes gegen Wettbewerbsbeschränkungen", (German Evaluation Report 2020), https://dserver.bundestag.de/btd/19/261/1926136.pdf

[235] Ibid, p. 4

[236] Ibid, p.

[237] Holmström et al., 'Killer Acquisitions?', p. 15, supra note 58

[238] Elena Argentesi et al., 'Merger Policy in Digital Markets: An *Ex Post* Assessment†', *Journal of Competition Law & Economics* 17, no. 1 (10 March 2021): p. 132, https://doi.org/10.1093/joclec/nhaa020.

[239] Alexiadis and Bobowiec, 'EU Merger Review of "Killer Acquisitions" in Digital Markets - Threshold Issues Governing Jurisdictional and Substantive Standards of Review', p. 75.

[240] Till 28.09.2020 only 31 mergers were notified based on the value-based threshold, p. 3 of the German Report, supra note 234

[241] Cunningham, Ederer, and Ma, 'Killer Acquisitions', p. 44, supra note 2

scrutiny. Nonetheless, such a threshold enables merging parties to adjust the transaction value so it does not trigger the notification obligation.

3.3.1.2 Predictability

The proposed threshold employs two criteria which have to be self-assessed by merging parties, the transaction price and the significant local activities.

Even though the calculation of the precise height of the total consideration is not an easy task, it is an "*objective, easily quantifiable and available to the parties.*"[242] Thus, this self-assessment exercise should be unproblematic.

The second criterion may, however, cause disputes. The Commission would have to publish a comprehensive guideline on how to assess significant local activities. Moreover, the informal talks with the Commission shall be used to remove any ambiguity. Till half of 2020 thirty-four informal talks were held in Germany with the BKA and in 29 cases undertakings were informed that the notification is not required. The major reason (19 cases) for non-notification was due to the lack of domestic activities.[243]

Though the introduction of this threshold may bring a certain level of uncertainty, this level may be decreased through the use of informal consultation with the Commission. Moreover, with the growing number of decision practise the unambiguity will also decrease.

3.3.1.3 EU Dimension

Setting up the threshold at EUR 5 billion guarantees that only the most significant mergers are captured. Moreover, it leaves the Member States the opportunity to introduce similar thresholds into their legal system as they can set their threshold low enough to match the size of their national market as done by Germany and Austria. This interplay between the European value-based threshold and national value-based threshold enables competition authorities to scrutinize the most problematic mergers which would otherwise go undetected.

Furthermore, the local nexus is established through the criterion of significant European activities. This criterion is fulfilled either if the undertaking to be acquired has significant business activities in the EU as a whole or if it has such activities in three or more Member States. For instance, a company like Google, offering services to customers across the entirety of the EU such as Google search, can be deemed to possess a significant European business

[242] OECD (2016), para. 53, supra note 116

[243] German Evaluation Report 2020, p. 3, supra note 234

presence. On the other hand, a pharmaceutical startup that is in the advanced Phase III clinical trials and seeks national authorization in four Member States serves as an exemplar of the latter scenario.

3.3.2 Overall assessment of the value-based criterion

A value-based threshold was debated on the EU level multiple times. The authors of the Crémer Report advocated against the introduction of such a threshold in 2019.[244] Since 2019 a lot of things have changed, most notably the UK departed from the EU and the European competition toolbox cannot benefit from the share of supply test anymore. The national experience of Germany and Austria illustrated the benefits of such a threshold, i.e., the ability to capture mergers which would otherwise go undetected.

Nevertheless, this threshold is not without inherent limitations. Most notably as exemplified by Cullingham's research, merging parties may have the incentive to agree on a deal price just below the threshold to escape the scrutiny of the Commission. Furthermore, there is a notable degree of uncertainty associated with the criterion of significant European activities. On the other hand, it is illusional to believe that there is any threshold which does not bring any uncertainties. In the end, it is up to the legislators to choose the right balance between certainty and efficiency.

[244] Crémer Report, supra note 26

Conclusion

A total of four different jurisdictional thresholds were analysed, leading to the proposition of four different amendments to the Merger Regulation. Each was assessed with consideration of three criteria. The first criterion was the effectiveness, i.e., its ability to capture potential killer acquisition. The second criterion was predictability, which assessed the extent of complexity or difficulty encountered by merging undertakings when determining whether their merger is subject to notification or not. The last criterion was the EU dimension, which gauged the criterion's ability to establish a local nexus for the merger within the jurisdiction where the merger is subject to scrutiny. All four analysed thresholds and their possible EU Merger Regulation amendments have met the EU dimension criterion. Where they differed was the effectiveness and predictability of each of them.

The market-share-based threshold, value-based threshold and the share of supply test are different from the dominant threshold, which is employed in Switzerland, as they all rely on quantifiable criteria. In contrast, the Swiss model bears a resemblance to a criminal record system found in criminal law.

It was argued that the Swiss model could be incorporated into the EU merger system without major difficulties. The only ambiguity lies in the interpretation of adjacent market. Additionally, such notification obligation may serve as another deterrent for undertakings to abuse their dominant position. However, such an amendment would not solve the issue of certain acquisitions, potentially killer acquisitions, evading scrutiny by the Commission as not only dominant undertakings engage in killer acquisitions. Moreover, a final non-appealable decision must be issued to trigger the obligation and such a procedure could be a lengthy one.

Only the market-share or value-based threshold might be incorporated into the current EU merger control system without fundamentally altering its foundation. The market-share-based threshold, however, introduces a considerable level of uncertainty. It was shown that delineating the relevant market is a challenging task. Undertakings do not possess the needed investigative powers as the Commission does. Thus, they must rely on presumptions and assumptions in some instances and as the Spanish and Portuguese experience shows, if their calculation of market shares is incorrect, they face a risk of gun-jumping procedures. These are both costly for undertakings but also for the Commission which would have to allocate resources which could be used elsewhere.

The value-based threshold is already employed in Germany, Austria, and India. The Indian version is a little different and was introduced only in the spring of 2023. German and Austrian experiences have demonstrated its effectiveness as a complementary threshold enabling the scrutiny of mergers which otherwise would go undetected. Nonetheless, such a threshold also has its drawbacks. Namely the ambiguity of the criterion of significant European business activities which is used to establish the local nexus of the merger. Furthermore, the merger consideration is at the discretion of the merging parties, raising the risk that the consideration could be strategically set to evade regulatory scrutiny.

An efficient way how the Commission may assert jurisdiction over potential killer acquisitions is by implementing the share of supply test. The most prominent advantage of this test is the flexibility. Moreover, as the Roche/Spark[245] decision showed it can be successfully implemented in the pharma sector which is prone to killer acquisitions. However, if such a test is employed in the current obligatory system, it would bring at least the same level of uncertainty as is associated with the market share test. Hence, a major change would be needed, and the notification system would need to be adjusted to a hybrid one. While exceeding the turnover threshold would still trigger mandatory notification and activate the stand-still obligation, surpassing the share of supply threshold would not automatically trigger these obligations. It would be up to merging parties to voluntarily notify or up to the Commission to assert jurisdiction from its own initiative.

At the beginning of this thesis, it was argued that there is a potential enforcement gap and a need for a change in the notification criteria. While the first premise still holds, the second does not. The current notification system enables the Commission to scrutinize the majority of potentially competitive significant mergers. The introduction of a complementary notification threshold could bring more mergers under Commission scrutiny, including potential killer acquisitions. However, a fundamental aspect of any notification system is that a significant portion of mergers eventually gets cleared, and some mergers that may warrant investigation go undetected. While the solution might be to employ all available notification criteria, such a solution would, however, increase the administrative burden and related costs of both undertakings and the Commission, potentially overwhelming the entire merger system.

A more efficient way how to tackle killer acquisition may be to give the Commission a residual jurisdiction over consummated mergers. This would save costs which are associated with the

[245] Roche / Spark, supra note 173

review of notified but non-problematic mergers, allowing resources to be redirected towards monitoring and identifying mergers warranting investigation. Moreover, the Commission would be able to rely on actual evidence of the effects of the merger rather than relying on assumptions as done in the *ex ante* assessment. However, the implementation of the residual jurisdiction raises certain issues. One issue is that an already completed merger has already caused market distortion. However, the residual jurisdiction can also serve as a deterrent as it can preclude undertakings from engaging in killer acquisition. Furthermore, it would have to be decided under which circumstances the Commission may intervene especially if such intervention is time limited as is the case of most jurisdictions which have this power or if it should be unlimited as is the case of the USA.[246] Nonetheless, these ideas are beyond the scope of this thesis and all possible benefits and drawbacks[247] would have to be analysed to reach a persuasive conclusion.

[246] OECD (2022), Disentangling Consummated Mergers: Experiences and Challenges, OECD Competition Policy Roundtable Background Note, p. 14-15, https://www.oecd.org/daf/competition/disentangling-consummated-mergers-experiences-and-challenges.htm

[247] Better competitive outcomes, administrative and regulatory savings, possibility to rely on hindsight from the market reaction to the merger and disciplining effect on the market behaviour of the merger entity are listed as the policy reasons for introducing residual jurisdiction. Whereas difficulties associated with detection of possible problematic mergers and proving causal link together with the danger of potentially lengthy and time consuming litigations are listed as policy drawback of such system. For details see: Ibid, p. 9-12.

List of abbreviations

“**2020 OECD Roundtable**”	Roundtable held by the OECD in 2020 titled: “Start-ups, killer acquisitions and merger control”
“**BKA**”	*Bundeskartellamt*, the German competition authority
“**CJEU**”	Court of Justice of the European Union
“**CMA**”	Competition and Markets Authority, UK competition authority
“**CNMC**”	*Comisión Nacional de los Mercados y la Competencia*, Spanish competition authority
“**Commission**”	European Commission
“**Digital Bill**”	Digital Markets, Competition and Consumers Bill*,* Bill 350 2022-23
“**DMA**”	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) (Text with EEA relevance), OJ L 265, 12.10.2022
“**Draft Indian Regulation**”	The Competition Commission of India (Combinations) Regulations, 2023
“**Draft Notice**”	Draft of the Commission Notice on the definition of the relevant market for the purposes of Union competition law
“**Enterprise Act**”	Enterprise Act 2002
“EU Evaluation Report”	Commission Staff Working Document Evaluation of procedural and jurisdictional aspects of EU merger control
“**FTC**”	Federal Trade Commission, US competition authority

“GAFAM”	Google (Alphabet), Amazon, Facebook (Meta), Apple and Microsoft commonly also known as the Big Tech
“**Horizontal Merger Guidelines**”	Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004
“**ICN Recommendation**”	ICN Recommended Practices for Merger Notification and Review Procedures
“**Merger Regulation**”	Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (Text with EEA relevance), OJ L 24, 29.1.2004
“**Meta/Kustomer judgement**“	Judgement of the Düsseldorf Higher Regional Court (Oberlandesgericht Düsseldorf) of 23 November 2022, META/Kustomer, Kart 11/21 (V)
“**Non-horizontal Merger Guidelines**”	Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18.10.2008
“**Notice**”	Commission Notice on the definition of relevant market for the purposes of Community competition law .OJ C 372, 9,12,1997
“**OECD**”	Organisation for Economic Co-operation and Development
“**OECD Recommendation**”	Recommendation of the Council on Merger Review, OECD/LEGAL/0333
“**PCA**”	*Autoridade da Concorrencia,* Portugues competiton authority
“**Summary of Public Consultation 2016**”	Summary of replies to the Public Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control
“**Updated Guidelines”**	*Leitfaden Transaktionswert-Schwellen für die Anmeldepflicht von Zusammenschlussvorhaben (§ 35 Abs. 1a GWB und § 9 Abs. 4 KartG),* Guidelines on transaction value thresholds for the

	notification obligation of proposed mergers (Section 35 (1a) ARC and Section 9 (4) KartG)
“**US Congress Report**”	“Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations” issued by the Democratic Majority of the Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary of the U.S. House of Representatives

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Český abstrakt

Regulace killer acquisitions dle evropského soutěžního práva v evropském a mezinárodním srovnání

Collen Cunningham spolu se svými kolegy představila ve své práci nazvané "Killer Acquisitions" novou teorii újmy známou jako "killer acquisitions". Zabijácká akvizice spočívá v tom, že již zavedený hráč na trhu akvíruje potenciálního konkurenta s úmyslem ukončit jeho inovační projekt. Hlavním cílem takové akvizice je eliminovat potenciální konkurenci, která by mohla vzniknout v důsledku inovačního projektu akvírovaného konkurenta. Obvykle jsou potenciálními cíli takových scénářů inovativní začínající podniky, tzv. start-upy, které nedosahují obratu dostatečně vysokého, aby byla překročena prahová hodnota pro oznámení spojení používaná v EU, která vychází pouze z obratu spojujících se podniků.

V důsledku toho Evropská komise hledala jiné způsoby, jak získat jurisdikci nad takovými transakcemi, zejména prostřednictvím využití článku 22 Nařízení o kontrole spojování. Práce vychází z předpokladu, že současný systém kontroly spojování na evropské úrovni není neprůstřelný a že existuje potenciální mezera, která vyžaduje změnu Nařízení o kontrole spojování.

Proto bylo analyzováno několik alternativních jurisdikčních kritérií. Konkrétně test tržního podílu používaný ve Španělsku a Portugalsku, švýcarská povinnost dominantních podniků oznamovat své spojení, test podílu na dodávkách používaný ve Velké Británii a testy založené na hodnotě transakce používané v Německu, Rakousku a Indii. Každý jurisdikční test má své výhody a nevýhody.

Test založený na podílu na trhu může ohrozit právní jistotu a potenciálně vést k nárůstu tzv- "gun-jumping" řízení, jak je patrné ze španělských a portugalských zkušeností. Švýcarské řešení může sloužit jako užitečné doplňkové kritérium, ale problém neřeší komplexně. Test podílu na dodávkách se zdá být díky své flexibilitě ideálním kandidátem na získání jurisdikce nad potenciálními zabijáckými akvizicemi. Zavedení tohoto testu do právního rámce EU by však vyžadovalo změnu koncepce kontroly spojování podniků v EU a přechod od povinného k hybridnímu modelu. Nakonec byl analyzován také test hodnoty transakce. Toto kritérium může být účinné při zachycování transakcí, které by jinak mohly zůstat neprověřeny. Omezení však spočívá v nejistotě spojené s kritériem "významné místní činnosti", které se používá k určení lokálního nexusu spojení. Provedená analýza ukazuje, že jakákoli změna Nařízení o kontrole spojování je spojena s náklady a že je třeba pečlivě zvážit přínosy oproti rizikům spojeným se změnou tohoto nařízení.

Klíčová slova

Zabijácké akvizice / spojení s nízkým obratem / změna nařízení o kontrole spojování / prahová hodnota pro oznamování / kontrola koncentrací

English abstract

Merger regulation of killer acquisitions under European competition law in European and international comparison

Collen Cunningham, along with her colleagues, introduced a novel theory of harm known as a "killer acquisition" in her paper titled "Killer Acquisitions." A killer acquisition involves an already well-established market player acquiring a potential competitor with the intent to discontinue the acquired innovation project. The primary objective of such an acquisition is to eliminate potential competition that might arise from the innovative project of the acquired competitor. Typically, the potential targets of such scenarios are innovative start-ups that do not generate sufficient turnover to trigger the notification threshold employed in the EU, which relies solely on the turnover of merging parties.

As a result, the European Commission sought other ways to assert jurisdiction over such transactions, most notably through the utilization of Article 22 of the Merger Regulation. However, it is argued that the current system of merger control at the European level is not bulletproof and a potential enforcement gap necessitating an amendment of the Merger Regulation exists.

Consequently, several alternative criteria have been analysed, namely, the market-share test used in Spain and Portugal, the Swiss obligation for dominant undertakings to notify their mergers, the share of supply test employed in the UK, and the transaction value-based tests used in Germany, Austria, and India. Each threshold has its benefits and drawbacks.

The market share-based test may compromise legal certainty and potentially lead to an increase in gun-jumping procedures, as seen in the Spanish and Portuguese experiences. The Swiss solution may serve as a useful complementary criterion but does not comprehensively solve the problem. The share of supply test seems to be a perfect candidate for asserting control over potential killer acquisitions due to its flexibility. However, implementing this test into the EU legal framework would necessitate a change in the concept of EU merger control, shifting from an obligatory to a hybrid model. Finally, the transaction value test was also analysed. This criterion may be effective in capturing transactions that might otherwise go undetected. However, a limitation lies in the uncertainty associated with the "significant local activities" criterion used to establish the local nexus. This analysis demonstrates that any modification to the Merger Regulation comes with associated costs, and the benefits must be carefully weighed against the risks inherent in amending the Merger Regulation.

Keywords

Killer acquisitions / low turnover mergers / amendment of the Merger Regulation / notification threshold / merger control