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The Regulatory Gap in Merger Control Vis-à-Vis the New-Economy

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Abstract

The new-economy encompasses a variety of industries, particularly pharmaceuticals and online-based companies. These may hold strong market positions, or be strong future competitors, despite having low turnover. Where foreclosure techniques to curtail competition are employed, the concentration may result in a long-lasting anti-competitive impact on the market. However, due to low or insufficient turnover, these transactions may avoid merger control where notification thresholds are turnover-based.

The purpose of this thesis is to investigate if a regulatory gap exists in merger control legislation, and if so to what extent. This is assessed through analysing new-economy transactions within the framework of the thresholds in Article 1 EUMR, thus examining if the thresholds in the EUMR creates a regulatory gap on an EU level. The thesis further analyses the potential need for reform on a Member State level as this is relevant from an internal market perspective, the importance of national legislation where the EUMR does not apply and the active role of NCAs. The effect of alternative thresholds is also examined should reform prove necessary. This allows for a holistic discussion and considers potential future legal development.

The thesis contends that a regulatory gap does exist within the EUMR but that it is not isolated to the EUMR as it can also be observed on a national level. The regulatory gap is of particular importance due to the new-economy sectors' importance within the modern economy and the risk of long-term anti-competitive effects on the market. It is argued that this results in an overarching need for reform, but the need for reform must be balanced against the additional costs and burdens on authorities and companies.

Within the EU, reform may follow the Commission's public consultation into the need for additional merger control thresholds in the EUMR. On a national level, reform may come through the influence of other jurisdictions within the EU or through spontaneous harmonisation. This is a process where Member States incrementally align their laws with EU law and, to an extent, other Member States' laws. If national reform does occur, new-

economy concentrations would be best captured through utilising a voluntary notification system. However, it is argued that such a system must be combined with a residual jurisdiction for NCAs as well as an effective monitoring system over M&A activity to ensure its functionality. None of the models examined are flawless and all may strongly influence how M&A transactions are structured as well as how NCAs and the Commission operate. However, the importance of effective merger review over new-economy concentrations implies that measures must be taken.

Abbreviations

CJEU	Court of Justice of the European Union
CMA	(United Kingdom) Competition and Markets Authority
EU	European Union
EUMR	European Union Merger Regulation (Council Regulation No 139/2004)
FTC	(United States of America) Federal Trade Commission
ICN	International Competition Network
IP	Intellectual Property
KKV	(Sweden) Konkurrensverket
M&A	Mergers and Acquisitions
NCA	National Competition Authority
OECD	Organisation for Economic Co-operation and Development
R&D	Research and Development
SEP	Standard Essential Patent
SIEC	Significant Impediment to Effective Competition
TEU	Treaty on European Union (Treaty on European Union, 2012 O.J. C 326/01)
TFEU	Treaty on the Functioning of the European Union (Treaty on the Functioning of the European Union, 2012 O.J. C 326/01)
UK	United Kingdom

1 Introduction

1.1 Background

From a merger control perspective the *Facebook/WhatsApp*¹ concentration raises problematic aspects on the topic of jurisdiction in merger control. The concentration was one involving two well-known undertakings, a substantial acquisition price and yet, it escaped the scope of the European Union Merger Regulation (henceforth ‘EUMR’) due to WhatsApp's lack of sufficient turnover. As a response, the Commission launched inquiries into the need for reform of the current turnover-based thresholds² and the establishment of alternative thresholds based on the value of the transaction. The inquiry accentuates new-economy transactions. One may define these transactions as those within sectors consisting of high levels of Research and Development (henceforth ‘R&D’), in particular pharmaceuticals and high-technology, where companies may have great potential and monetary value but low turnover. Legislation reliant on turnover-based thresholds may thus have a regulatory gap.

Facebook/WhatsApp was ultimately remedied by resorting to referral mechanisms in the EUMR. However, the potential regulatory gap it highlights is not trivial. The Commission inquiry is further relevant in light of the Phase II investigation into Apple's acquisition of Shazam³. This is a recent example of a *Facebook/WhatsApp*-like transaction that too fell outside the scope of the EUMR and demonstrates that the concept of a regulatory gap might be an ongoing issue. This is especially so since Austria, by recent reform of its

¹ Case M.7217 – Facebook/WhatsApp [2014]. [cit. Facebook/WhatsApp (2014)].

² Directorate-General for Competition, 'Public Consultations: Consultation on Evaluation of Procedural and Jurisdictional Aspects of EU Merger Control' (*European Commission*, 7 October 2016)

<http://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html>

accessed 2 February 2018. [cit. DG Comp,

http://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html, (2016)].

³ Commission Press Release, IP/18/664 (6 February 2018). [cit. Commission, Press Release IP/18/664, (2018)]; Case M.8788 – Apple/Shazam [2018] [cit. Apple/Shazam (2018)]; Commission Press Release, IP/18/3505 (23 April 2018). [cit. Commission, Press Release IP/18/3505, (2018)].

thresholds, was the sole Member State that caught the transaction. The Austrian reform thus allowed a transaction, that would otherwise not be reviewed, to be referred to the Commission through Article 22 EUMR. However, one should question the appropriateness of the Commission having to rely on Member States' thresholds and EUMR referral mechanisms to safeguard against these kinds of transactions. Whilst demonstrating that referral mechanisms are operational, they may fail to fully protect against anti-competitive new-economy transactions and European Union (henceforth 'EU') legislation should arguably not be solely relying on their ability to do so. As the new-economy evolves, further problematic cases may appear. Thus, one should ask what is needed to ensure proper safeguarding of the market.

1.2 Purpose

There is therefore a need for consideration of jurisdictional issues in the EUMR with particular focus on new-economy transactions. The choice to focus on new-economy transactions stems from the sector's particular characteristics, especially the low levels of turnover, and the heightened attention the Commission gives to this group of transactions. The low levels of turnover implies that transactions may avoid merger review where thresholds are turnover-based, thus demonstrating a potential regulatory gap and increasing the likelihood of anti-competitive effects impacting the market. This creates a field of research of great significance as new-economy transactions are an increasingly important sector of the economy⁴.

Notwithstanding, replies to the Commission inquiry, demonstrate an opinion that reform is unnecessary⁵ as Member States act as whistle-blowers through referral mechanisms. However, such statements assume that

⁴ See for example European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards a Thriving Data-Driven Economy [2014]. COM(2014) 442 final. [cit. Commission, Towards a Thriving Data-Driven Economy, (2014)].

⁵ European Commission, 'Summary of Replies to the Public Consultation on Evaluation of Procedural and Jurisdictional Aspects of EU Merger Control' [July 2017]. Available at <http://ec.europa.eu/competition/consultations/2016_merger_control/summary_of_replies_en.pdf> accessed 31 January 2018. [cit. Commission, Summary of Replies to the Public Consultation, (2017)], at 5.

notifications are in fact made on a national level and that requests for referral to the Commission, where appropriate, are systematically approved. They also lack sufficient appreciation for specific sectors such as pharmaceuticals, technology or other industries that may have low turnover. One should question such assumptions and omissions. Thus, research into the optimal way of safeguarding the market and remedying the potential regulatory gap in situations of new-economy concentrations is vital. If a regulatory gap can be found to exist, the thesis also aims to examine the scope of such a gap. This will be done through assessing if the same gap can be found on a Member State level, thus increasing potential harm on the internal market overall as well as increasing the extent of a possible regulatory gap. Thus, to minimise anti-competitive effects one must also look to the potential necessity for reform on a Member State level. Consequently, the thesis also looks at alternative threshold models that may be used by Member States, which permits discussion regarding necessary characteristics of models as well as an understanding of the potential measures that are required. The alternative models have been selected by reference to existing literature⁶, present use⁷, past Commission documents⁸ as well as specific relevance for new-economy transactions⁹.

1.3 Research Question

This thesis thus examines *if there is a need for reform to merger control thresholds within the EU, in light of the new-economy sector, and if so, to what extent?*

⁶ See for example M Broberg, 'Improving the EU Merger Regulation's Delimitation of Jurisdiction: Re-defining the Notion of Union Dimension' [2014] 5(5) *Journal of European Competition Law & Practice*. [cit. Broberg (2014)].

⁷ Such as the voluntary model used in the UK; Enterprise Act [2002]; UK Competition and Market Authority, 'Mergers: Guidance on the CMA's Jurisdiction and Procedure' [Jan 2014], at para 6(1). [cit. CMA, Merger Guidelines, (2014)].

⁸ Such as European Commission, Annex I to Green Paper on the Review of Council Regulation (EEC) No 4064/89, COM(2001) 745 Final (December 2001). [cit. Commission, Annex I to Green Paper, (2001)].

⁹ Such as models based on the amount of consumers.

1.4 Relevance

Much research exists on turnover-based thresholds and potential legislative reform, however there is lesser focus on the functioning of these thresholds vis-à-vis new-economy transactions. Much research is also solely focused on EU measures and arguably disregards the potential reforms within Member States that are necessary to eliminate potential anti-competitive harm. This thesis thus presents a different approach to the specific problem of new-economy transactions.

In discussing the relevance of this research area, one must note that previous scholarly work exists on similar topics, in particular the LL.M. thesis *Possible Merger Threshold Reform in the EU*¹⁰. The focus of Vilbergsdóttir's essay concerns jurisdictional issues in the EUMR. It places much emphasis on the definition of a concentration, judicial control and referral mechanisms and analyses reform to thresholds within that framework. As such, there are certain overlaps with this work. However, different approaches are taken, which makes this thesis of added value as it diverges from previous works.

This thesis explores issues brought on by the interaction between the new-economy and the EUMR jurisdictional thresholds. Furthermore, it provides analysis on the particular functioning of the size-of-transaction model as regards the new-economy. Crucially, its scope is broadened through having both a national and EU perspective as regards potential reform, consequences and notification models.

Realistically, the suggestions made in this thesis as regards national reforms will occur at an incremental pace, but any reform is likely to have a significant impact in practice. As such, this theoretical analysis may provide insight into a variety of notification thresholds, taking into account theoretical problems and practical effects.

¹⁰ Available at <https://lup.lub.lu.se/student-papers/search/publication/8933308>.

1.5 Outline

In chapter 2, the thesis focuses on the existing jurisdictional thresholds in the EUMR. The new-economy concept is developed and presented within this framework. An analysis of new-economy transactions follows. The focus then shifts to the size-of-transaction model in chapter 3. Here the thesis examines the model, problematic aspects and analyses the effect and efficiency of this model vis-à-vis new-economy transactions. The argument is then made, in chapter 4, that if reform is implemented on an EU level, a certain degree of reform is also required on Member State level to ensure that problems such as forum-shopping are adequately dealt with. The need for reform and harmonisation is examined as well as the likelihood of such change. Chapter 5 proceeds with examining notification models based on market shares and voluntary notification to use on a national level. These are considered in light of recommendations and best practices as well as their efficiency as regards capturing new-economy concentrations.

In chapter 6, the thesis will conclude that merger control legislation, because of new-economy transactions, do require reform as there is currently a regulatory gap within the EUMR that cannot, and should not, be solely remedied through referral mechanisms. Ultimately, whilst the size-of-transaction model has flaws, it also maintains a division of jurisdiction between the Commission and NCAs. However, one must not neglect the consequent need to reform individual national merger control systems which must logically follow to fully safeguard against potential harm produced by this group of transactions.

1.6 Methodology

To answer this question, an EU-legal method has been utilised whereby the law is examined from a teleological perspective. An EU-legal method also entails interpreting and analysing the law against EU objectives, one being the maintenance of competition on the market. As such, where current intelligence highlighted the potential regulatory gap in the EUMR it must be viewed within the correct framework, context and function. Through

employing an EU-legal method, one may also highlight the importance of contrasting the existing law (*de lege lata*) and what the law should be (*de lege ferenda*). The thesis aims to do so through examining the functionality of existing merger control thresholds in regards to new-economy transactions, as well as analysing potential reform and what any alternative merger control thresholds must achieve.¹¹

Consistent with the EU-legal method, the thesis employs policy analysis, legal principles, and policy considerations throughout to ensure that discussions on *de lege lata* and *de lege ferenda* are placed within the correct context. Thus, discussion as to requirements of the law and of reform are strengthened by the dialogue between legal principles, policy and a teleological perspective.

It is also vital to consider what consequent need for legal development will arise. This results in looking at national law and its symbiotic relationship with EU merger control and EU law. By doing this, the thesis proceeds with the EU-legal method through correctly observing the EU's legal pluralism and diversity as well as its vertical and horizontal nature.¹²

The use of sources also reflects the methodology used, however the sources also shape the methodology. The foundational sources used are primary sources in the form of EU legislation and jurisprudence. However, the discussion benefits, and is further developed, through the use of secondary sources, such as academic scholarship. This necessitates a critical approach to mitigate potential subjectivity in authorship, and potential criticism that may arise because of that, and also provides for personal analysis.

1.7 Limitations

This thesis has limited its discussion and analysis to certain topics due to temporal restrictions and word limitations. Within chapter 2, the focus is on giving an overview of the jurisdictional thresholds in the EUMR and analysing issues therefrom, rather than an in-depth study of its articles.

¹¹ F Korling, and M Zamboni, (2013). *Juridisk metodlära*. Studentlitteratur. [cit. Korling and Zamboni (2013)].

¹² J Hettne, (2011). *EU-rättslig metod*. 2nd Ed. Norstedts Juridik. [cit. Hettne (2011)].

Moreover, for a transaction to be notified to the Commission under the EUMR it must qualify as a concentration under Article 3 EUMR. Looking to Article 1, which sets out the thresholds and determines Commission jurisdiction, the language used is specifically limited to concentrations. Thus, where no concentration has been created, the jurisdictional question is not raised. Consequently, in examining jurisdictional issues for the purposes of this thesis there is no need to discuss the definition of a concentration.

From an overarching perspective, the legislative definition of a concentration may have vast implications on how the legislation interacts with new-economy transactions. Within the EUMR, if Article 3 is unable to qualify new-economy transactions as concentrations, they would escape Commission review. Thus, the efficiency and appropriateness of the definition of a concentration may be an excellent area for research. However, the research conducted by the author in the process of this thesis, as well as current intelligence, insinuates that turnover-based thresholds are currently a more relevant and acute field in regards to the new-economy. Consequently, to examine merger control vis-à-vis the new-economy in sufficient depth, the thesis focuses solely on the thresholds used for the delimitation of jurisdiction and establishing a duty to notify the concentration.

When considering referral mechanisms, the discussion is focused on those contained in Article 4(5) and Article 22 EUMR due to their prevalence in new-economy transactions. Chapter 3 assesses the functionality of a jurisdictional model based on the value of the transaction, however it focuses solely on the functionality in regards to new-economy transactions. Whilst chapter 4 looks at national reform, the specificities of each national system are not the focus of analysis. Rather, the focus is on the overarching need for implementation of thresholds capable of capturing new-economy transactions. Within the framework of national law, certain jurisdictions have been especially highlighted, these are Sweden, the United Kingdom (henceforth 'UK'), Germany and Austria. This choice relates to the fact that all four jurisdictions have alternative threshold models to those that are turnover-based. Furthermore, there was a need to highlight only some jurisdictions to demonstrate and discuss their examples, yet avoiding a

comparative narrative as this is not the purpose of their inclusion. It should further be noted that research used in this chapter at times refers to notification thresholds rather than jurisdictional thresholds. This is a matter of terminology, but the thesis' interest lies in their ability to capture new-economy transactions and ensuring NCAs' jurisdiction to evaluate such transactions. Thus, the research may be relied upon as where there is a duty to notify a transaction, the NCA also have legislative jurisdiction to do so. Chapter 5 examines models for notification systems; however, the author has had to select the most useful ones based on practicality, academic interest and availability of sources to ensure that the discussion remains relevant and accurate.

2 EUMR Jurisdictional Thresholds and the New-Economy

In examining the need for reform, one must first examine the law as it stands. This chapter will analyse the problematic aspects of the jurisdictional thresholds in the EUMR with regard to new-economy transactions. A discussion of the concept of new-economy transactions sets the framework for examining Article 1 EUMR. Thereafter, the chapter examines the actuality of the problem by analysing the interrelationship of the new-economy and Article 1 through looking at new-economy concentrations. Thus, the issue is presented and developed, demonstrating that the current thresholds are largely unable to assert Commission jurisdiction over new-economy concentrations.

2.1 The New-Economy Concept

The terminology of the new-economy may be traced to Evans and Schmalensee¹³, however, it is not an entirely new concept. New-economy transactions generally relate to fast-moving industries, with the potential for swift exits of firms, where the focus is on Intellectual Property (henceforth 'IP') development and ownership¹⁴. The concept encompasses players in sectors such as "computer [soft- and hardware], Internet-based businesses, telecommunications networks, mobile telephony, biotechnology (...) and pharmaceuticals"¹⁵. As such, the concept also captures companies involved with big data¹⁶ and the digital economy¹⁷.

¹³ D Evans, and R Schmalensee, 'Some Economic Aspects of Antitrust Analysis in Dynamically Competitive Industries' [2001] 8268 NBER Working Paper. [cit. Evans and Schmalensee (2001)].

¹⁴ D Gifford, and R Kudrle, 'Antitrust Approaches to Dynamically Competitive Industries in the United States and the European Union' [2011] 7 Journal of Competition Law & Economics. [cit. Gifford and Kudrle (2011)], at 700.

¹⁵ Gifford and Kudrle (2011), at 700.

¹⁶ M Kadar, and M Bogdan, 'Big Data' and EU Merger Control – A Case Review' [2017] 8(8) Journal of European Competition Law & Practice. [cit. Kadar and Bogdan (2017)], at 479.

¹⁷ Kadar and Bogdan (2017), at 479.

The focus on R&D entails certain sunk costs due to the need for high levels of investment¹⁸. However, some investments may permit long-term reductions in operating costs by allowing for network effects¹⁹ and economies of scale²⁰. Such characteristics may be considered to strengthen market positions to the point where changes on the market are unlikely²¹. However, within the new-economy sector, markets may be very volatile and strategic investments are necessary to maintain competitive edge. This relates to the fast-moving pace of certain industries e.g. in computer software where skilled software engineers may gain large parts of a market with low entry costs²². Within the new-economy, competition is innovation driven; however, there is also rivalry for horizontal markets through synergies and integration²³. Hence there are benefits of Mergers and Acquisitions (henceforth 'M&A') related transactions with competitors.

Significant costs are generally associated with larger companies, but new entrants may produce intense competition through drastic innovation; younger market players thus act as creators and drivers of fast-evolving markets. This allows for the formation of novel mass networks, but may be particularly detrimental for incumbent Internet-based companies²⁴. Many new-economy businesses contain network-based models where the amount of consumers is fundamental to market leadership and innovation²⁵. This results in the new-economy concept constituting a sector where "winners get large market shares and high profits for a while"²⁶, but must further reinvest into R&D for continuously high market shares, consumer influx and

¹⁸ Evans and Schmalensee (2001), at 7.

¹⁹ A Capobianco, and A Nyeso, 'Challenges for Competition Law Enforcement and Policy in the Digital Economy' [2018] 9(1) *Journal of European Competition Law & Practice*. [cit. Capobianco and Nyeso (2018)], at 21.

²⁰ Evans and Schmalensee (2001), at 8.

²¹ Capobianco and Nyeso (2018), at 21.

²² A Boutin, and X Boutin, 'Proposals for a More Efficient European Merger Control' [2017]. Available at

<http://ec.europa.eu/competition/consultations/2016_merger_control/aleksandra_boutin_and_xavier_boutin_contribution_en.pdf> accessed 3 April 2018. [cit. Boutin and Boutin (2017)], at para 32.

²³ Capobianco and Nyeso (2018), at 22.

²⁴ Evans and Schmalensee (2001), at 9.

²⁵ Boutin and Boutin (2017), at para 31.

²⁶ Evans and Schmalensee (2001), at 10.

competitiveness²⁷. Consequently, one may consider the new-economy to consist of businesses from sectors whose success and competitiveness depends on IP and innovation. Such businesses are largely active on vulnerable markets, capable of swift changes in market structure, due to strong competitors, actual and potential, and rapid innovation.

However, through an M&A process, these market players are able to acquire competing IP, or integrate with competitors²⁸. These are some of the main motives for M&A activity²⁹. There are also opportunities for strategic acquisitions, which may permanently damage the market, whereby more established firms can acquire potential future rivals. Such pre-emptive measures effectively allow for *ex ante* foreclosure of potential competitors³⁰. Simultaneously, restructuring allows firms to realise efficiencies of scope and scale as well as pooling, or acquiring, R&D, thus decreasing costs. As the economy, and its reliance on the new-economy sector increases, the efficiencies and possible harm arising from new-economy concentrations likely become more complex, which may make an assessment of the concentration harder³¹. Whilst the option to engage in M&A is a fundamental feature in a free market economy³², one must also ensure appropriate review of that activity. When dealing with M&A activity within the pharmaceutical sector, for example, one may argue that transactions allow for production to be more efficient and patented products to reach the market quicker³³. This may ultimately benefit consumer welfare. However, M&A transactions may also be used as a strategic tool to block patents to reach markets where the patented product would compete with other products already on the market. Merger control thus acts as a guardian of consumer welfare and of a functional

²⁷ Evans and Schmalensee (2001), at 13.

²⁸ Gifford and Kudrle (2011), at 700.

²⁹ A Jones, and B Sufrin, (2016). *EU Competition Law: Texts, Cases and Materials*. 6th Ed. Oxford University Press [cit. Jones and Sufrin (2016)], at 1086.

³⁰ Capobianco and Nyeso (2018), at 26.

³¹ Boutin and Boutin (2017), at para 34.

³² R Whish, and D Bailey, (2015). *Competition Law*. 8th Ed. Oxford University Press. [cit. Whish and Bailey (2015)], at 862.

³³ Boutin and Boutin (2017), at para 37.

market³⁴, ensuring that anti-competitive concentrations do not alter the structure of the market in a harmful manner.

Such functions are reliant on the assumption that transactions are notifiable. When dealing with new-economy businesses this is not a given. Transactions within this sector may involve parties that have no, or little, turnover³⁵ but possess vital IP, Standard Essential Patents (henceforth 'SEP'), pipeline products or a highly skilled workforce and are therefore highly valued or considered strong competitors. A key issue is thus the foreclosure of potential future competition on the market³⁶ and the potential lack of assessment of such acquisitions due to insufficient turnover of the target. Importantly, the mere ownership of IP does not increase the turnover of a company as turnover regards "the amounts derived (...) from the sale of products and the provision of services"³⁷. Consequently, profits made from products that involve IP falls within this calculation but IP ownership in itself does not. Such considerations are ever more important as many Internet-based companies offer services without monetary consideration from consumers³⁸. Potential competition, IP and personal data accrued by smaller companies are key incentives for acquisitions within the new-economy³⁹. However, the lack of sufficient turnover means that potential competitors can be acquired by more established players but escape merger control. Lack of turnover is not necessarily permanent as revenue may be generated from charging for services that were previously free. One example of this is utilising data collected from users to sell online advertisements space⁴⁰ or, within pharmaceuticals, the launching of a new product for example⁴¹. From a

³⁴ Whish and Bailey (2015), at 860.

³⁵ P Bailey, 'European Commission Consults on Reforming Procedural and Jurisdictional Aspects of EU Merger Control' [2016] 389 Company Law Newsletter. [cit. Bailey (2016)], at 1; M Davilla, 'Is Big Data a Different Kind of Animal? The Treatment of Big Data under EU Competition Rules' [2017] 8(6) Journal of European Competition Law & Practice. [cit. Davilla (2017)], at 377-378.

³⁶ Capobianco and Nyeso (2018), at 26.

³⁷ Article 5, EUMR.

³⁸ M Sauer mann, 'Digitalisierung: neue Aufgreifkriterien der Fusionskontrolle in der 9. GWB-Novelle' [2017] 97(6) Wirtschaftsdienst. [cit. Sauer mann (2017)], at 428.

³⁹ V Volny, 'Personuppgifter som valuta I den digitala ekonomin – en analys av den konkurrensrättsliga betydelsen av förvärv, insamling och hantering av personuppgifter i EU' [2017] 1 Juridisk Publikation. [cit. Volny (2017)], at 93.

⁴⁰ Volny (2017), at 92.

⁴¹ Sauer mann (2017), at 428.

merger control perspective, this points to the potential need for thresholds capable of accounting for transactions where a party does not have any, or high enough, turnover yet.

2.2 Turnover-Based Thresholds

2.2.1 Article 1 EUMR and the Notion of Union Dimension

In the EU, the turnover-based jurisdictional thresholds in the EUMR cause a discrepancy with regard to new-economy M&A transactions. Article 1(2) contains the primary thresholds and determines Commission jurisdiction. Where the thresholds are satisfied the Commission has exclusive jurisdiction over such concentrations⁴². Article 1(2) establishes jurisdiction where there is a combined worldwide turnover of 5000 million EUR and more than 250 million EUR in Union turnover for at least two of the undertakings involved. Where each undertaking acquires 2/3 of the turnover in a single Member State, Union dimension under Article 1(2) is excluded. Article 1(3) consists of secondary turnover-based thresholds where the concentration has failed to reach the thresholds in Article 1(2). This additional turnover test aims to remedy multiple filing situations across Member States⁴³ and broadens the Commission's jurisdiction. Once Commission jurisdiction is established, jurisdiction will not be re-examined⁴⁴ on the basis of subsequent amendment to the notified concentration that may change the calculation of turnover⁴⁵. Thus, jurisdiction, once established, is permanent⁴⁶.

The thresholds perform several roles. Firstly, the reference to geographic turnover aims to ensure a local nexus to the Union or individual Member States⁴⁷. Secondly, the test employs turnover as a proxy for a transaction's impact on the Union market and a reflection of it having a Union

⁴² (17)-(18) Preamble, EUMR; Commission Jurisdictional Notice, 2008 O.J. C 95/01. [cit. Commission Jurisdictional Notice (2008)], at para 124.

⁴³ Commission Jurisdictional Notice (2008), at para 126.

⁴⁴ C-202/06 P *Cementbouw Handel & Industrie BV v Commission* [2007] ECLI:EU:C:2007:814. [cit. *Cementbouw v Commission* (2007)], at para 39.

⁴⁵ *Cementbouw v Commission* (2007), at para 41.

⁴⁶ Subject to referral mechanisms established in the EUMR.

⁴⁷ Commission Jurisdictional Notice (2008), at para 124.

dimension⁴⁸. Thirdly, the thresholds determine Commission jurisdiction and aim to do so in a clear and objective fashion⁴⁹, which is partly the reason for opting for an objectively quantifiable proxy. Fourthly, satisfying the thresholds confers an obligation to notify the concentration to the Commission⁵⁰. The form and nature of the thresholds mean that they fulfil these roles purely based on quantitative data and, according to the Commission Jurisdictional Notice⁵¹, they are not meant to assess the substantive impact of the concentration⁵². In itself, this is not criticised, however one may question the efficiency of these thresholds in regards to new-economy transactions.

The division of jurisdiction has its basis in the notion of 'Union dimension', which is what the thresholds are supposed to be representative of. The concept aims to distinguish between concentrations solely affecting national markets and concentrations affecting the internal market. Thus, the concept reflects the principle of subsidiarity in Article 5(3) of the Treaty on European Union (henceforth 'TEU'). Arguably, the balance between Union jurisdiction and subsidiarity is consequently a legal question against a political backdrop⁵³. However, the turnover-based thresholds that arise out of this Union dimension result in the assessment of a qualitative question through quantitative data⁵⁴. The thresholds used for jurisdictional delineation look at the size of the parties involved, rather than looking at a concentration's competitive importance, its potential anti-competitive effects and nature of the concentration as cross-border, as implied by the notion of Union dimension⁵⁵.

⁴⁸ Commission Jurisdictional Notice (2008), at para 124.

⁴⁹ Commission Jurisdictional Notice (2008), at para 127.

⁵⁰ Article 4, EUMR.

⁵¹ Commission Jurisdictional Notice (2008), at para 127.

⁵² Commission Jurisdictional Notice (2008), at para 127.

⁵³ M Broberg. (2013). *Broberg on the European Commission's Jurisdiction to Scrutinise Mergers*. 4th Ed. Kluwer Law International [cit. Broberg (2013)], at 253.

⁵⁴ M Broberg, 'Improving the EU Merger Regulation's Delimitation of Jurisdiction: Re-defining the Notion of Union Dimension' [2014] 5(5) *Journal of European Competition Law & Practice*. [cit. Broberg (2014)], at 263.

⁵⁵ Broberg (2014), at 264.

2.2.2 The Regulatory Gap

This argument supports the proposition that vital new-economy transactions currently escape merger review by the Commission, due to target companies generally being small in terms of turnover. As jurisdictional thresholds in Article 1 EUMR assume the importance of a transaction based on the size of the parties and the parties' turnover⁵⁶, they may continue to fall outside the scope of the EUMR. Hence, one may argue that the thresholds currently under-regulate new-economy concentrations and that there is a regulatory gap in the EUMR.

One must thus question the appropriateness of turnover-based thresholds ensuring the review of potentially anti-competitive transactions. Such criticism is not a new phenomenon⁵⁷; however, the debate has intensified in light of the Commission's interests following heightened M&A activity during 2016⁵⁸ in sectors such as "technology, media and telecoms"⁵⁹ and the digital economy. A regulatory gap may be detected as transactions with insufficient turnover avoid notification on an EU level, thus this is a particular problem within the new-economy sector⁶⁰. One could also argue that, rather than avoiding the obligation to notify, parties are unable to notify a concentration to the Commission due to not satisfying the thresholds. Consequently, companies within the new-economy sector may be unable to

⁵⁶ Broberg (2013), at 260.

⁵⁷ See for example European Commission, Green Paper on the Review of Council Regulation (EEC) No 4064/89, COM(2001) 745 Final (December 2001). [cit. Commission, Green Paper, (2001)], where issues were highlighted eventually leading to the current EUMR.

⁵⁸ C Pouncey, K Fountoukakos, P Rowland, C Puech-Baron, D Katrana, and L Maly, 'EU Merger Control in 2016-2017: Shifting Account Settings?' (*Global Competition Review*, 14 August 2017) <<https://globalcompetitionreview.com/insight/the-european-middle-eastern-and-african-antitrust-review-2018/1145620/european-union-merger-control>> accessed 26 January 2018. [cit. Pouncey and Fountoukakos and Rowland and Puech-Baron and Katrana and Maly, <https://globalcompetitionreview.com/insight/the-european-middle-eastern-and-african-antitrust-review-2018/1145620/european-union-merger-control>, (2018)].

⁵⁹ Pouncey and Fountoukakos and Rowland and Puech-Baron and Katrana and Maly, <https://globalcompetitionreview.com/insight/the-european-middle-eastern-and-african-antitrust-review-2018/1145620/european-union-merger-control>, (2018).

⁶⁰ Pouncey and Fountoukakos and Rowland and Puech-Baron and Katrana and Maly, <https://globalcompetitionreview.com/insight/the-european-middle-eastern-and-african-antitrust-review-2018/1145620/european-union-merger-control>, (2018).

gain the certainty and predictability that is associated with a regulatory approval.

A large undertaking may purchase a biotechnological company with low turnover because the target company has strong pipeline products that have not yet entered the market. In the digital economy, a successful company may have a wide consumer base and be in possession of large quantities of personal data, thus being an attractive target to a larger market player. In both of these situations, avoiding notification under the EUMR is possible due to the companies' low turnover or the target's lack of turnover. This situation may arise even where companies are dominant, have competitive strength, strong market potential or IP ownership⁶¹, thus increasing the potential for anti-competitive harm and need for closing the regulatory gap.

2.3 New-Economy Transactions

A series of cases demonstrate the actuality of this regulatory gap. Firstly, one may look to *Google/DoubleClick*⁶² within digital advertising and technology markets. The transaction did not have a Union dimension under Article 1 EUMR⁶³. However, facing a situation of multiple filings across Member States the parties requested Commission jurisdiction under Article 4 EUMR⁶⁴. Whilst recognising the potential for the parties to become direct competitors within advertisement serving tools, the existence of other competitors on the market was found to constitute a sufficient competitive constraint⁶⁵. Ultimately, the Commission cleared the concentration following its merger control review.

The case thereby demonstrates a situation where the thresholds in the EUMR were not satisfied, but in light of the burden of multiple filings the parties request Commission jurisdiction. This is notable considering the partial horizontal overlap and the strength of Google, thus indicating the weakness of the thresholds in failing to capture a potentially important

⁶¹ Bailey (2016), at 3.

⁶² COMP/M.4731 – Google/DoubleClick [2008]. [cit. Google/DoubleClick (2008)].

⁶³ Google/DoubleClick (2008), at para 7.

⁶⁴ Google/DoubleClick (2008), at para 7.

⁶⁵ Google/DoubleClick (2008), at paras 284-285.

concentration. The Federal Trade Commission (henceforth 'FTC') also cleared the transaction⁶⁶. However, Commissioner Harbour dissented in the decision due to "alternative predictions" about the market and the role played by the transaction⁶⁷. Such analysis highlights a certain risk in assessing new-economy concentrations due to difficulties in predicting the future market, especially in light of uncertainties regarding innovation⁶⁸, ultimately increasing the chance for false positives and false negatives⁶⁹ in any merger control assessment.

Google/DoubleClick exhibits continuing trends and similarities to other new-economy cases. The risk of uncertainties as to the competitive assessment reappeared in *Dow/DuPont*⁷⁰. However, the Commission's findings of a potential reduction of innovation on the market regarding chemicals demonstrate that the risk of uncertainties does not prohibit a competitive assessment, as well as demonstrating the Commission's capabilities in making such assessments. The issue of not meeting turnover thresholds arose again in *Pfizer/Ferrosan Consumer Healthcare Business*⁷¹, within the pharmaceutical sector, where Article 4(5) EUMR was utilised to make notification to the Commission possible.

Neither *Google/DoubleClick* nor *Pfizer/Ferrosan Consumer Healthcare Business* faced opposition, nor conditions, by the Commission. Clearance in *Dow/DuPont* was, however, subject to substantial divestment commitments. Such conditions were also present in *Abbot Laboratories/St Jude Medical*⁷² where there were horizontal overlaps as both companies were

⁶⁶ Kadar and Bogdan (2017), at 480.

⁶⁷ B Abramson, 'Are Online Markets Real and Relevant – From the Monster-Hotjobs Mergers to the Google-DoubleClick Merger' [2008] 4(3) *Journal of Competition Law & Economics*. [cit. Abramson (2008)], at 661.

⁶⁸ Pouncey and Fountoukakos and Rowland and Puech-Baron and Katrana and Maly, <https://globalcompetitionreview.com/insight/the-european-middle-eastern-and-african-antitrust-review-2018/1145620/european-union-merger-control>, (2018).

⁶⁹ False positives regard a decision where a concentration is blocked, but the concentration would actually not have been harmful to competition. False negatives is where a decision clears a concentration, but the concentration in fact does pose a significant impediment to effective competition. See to this effect Whish and Bailey (2015), at 865.

⁷⁰ Case M.7932 – *Dow/DuPont* [2017]. [cit. *Dow/DuPont* (2017)].

⁷¹ COMP/M.6162 – *Pfizer/Ferrosan Consumer Healthcare Business* [2011]. [cit. *Pfizer/Ferrosan* (2011)].

⁷² Case M.8060 – *Abbot Laboratories/St Jude Medical* [2017]. [cit. *Abbot Laboratories/St Jude Medical* (2017)].

active in the market for medical and dental instruments. Abbot's pipeline product was likely to threaten St Jude's dominance; ultimately, the Commission cleared the concentration subject to Abbot divesting the pipeline product business, removing the horizontal overlap⁷³. Divestments of this nature are alarming within the new-economy due to the focus on R&D and innovation. Thus, the order to divest may arguably offset a large part of the motive behind the transaction. This further highlights the need for ensuring that merger control thresholds are able to capture new-economy transactions and thus subject them to an effective merger control review.

In *Google/DoubleClick*, a factor in the Commission's assessment was the existence of other market actors imposing a sufficient competitive constraint. *Sanofi/Boehringer Ingelheim Consumer Healthcare Business*⁷⁴, within the pharmaceutical industry, demonstrates similar tendencies as proposed commitments of substantial divestments of local businesses and brands had to be made to gain clearance. Unlike *Google/DoubleClick*, there were an insufficient number of other market actors⁷⁵ constraining the parties to the transaction. One may point to how market specific merger analysis is; however, this is the case regardless of whether a transaction falls within the new-economy sector or not. Rather, one must recognise that the existence, or non-existence, of competing market actors have a critical role in new-economy markets due to their volatile nature. Therefore, one must question the reasoning in *Google/DoubleClick* from a long-term perspective. Whilst concepts such as legitimate expectations, predictability and legal certainty prohibit excessive *ex ante* predictions in an assessment, competition law must ensure competitive markets and reduce the cost of false positives and false negatives. This means that not only must new-economy transactions be subject to merger review, but that, a fundamental understanding of the concept must also exist for the review to be effective.

⁷³ Commission Press Release, IP/16/3941 (23 November 2016). [cit. Commission, Press Release IP/16/3941, (2016)].

⁷⁴ Case M.7919 Sanofi/Boehringer Ingelheim Consumer Healthcare Business [2016]. [cit. Sanofi/Boehringer Ingelheim (2016)].

⁷⁵ Pouncey and Fountoukakos and Rowland and Puech-Baron and Katrana and Maly, <https://globalcompetitionreview.com/insight/the-european-middle-eastern-and-african-antitrust-review-2018/1145620/european-union-merger-control>, (2018).

For a full discussion, one must refer to the *Facebook/WhatsApp*⁷⁶ concentration. The transaction failed to meet the turnover thresholds in the EUMR; instead, Facebook requested Commission jurisdiction through Article 4(5) EUMR as the concentration otherwise had to be notified in three undisclosed Member States. In the Commission's assessment of the concentration, it was found that Facebook and WhatsApp were not close competitors within the messaging services market, arguably the most obvious horizontal overlap and potential reason for competitive harm⁷⁷. However, one could argue that the Commission failed to take into account that within fast-moving markets, such as the new-economy, complementary services can quickly become substitutes⁷⁸. At the same time, in line with legal principles, the Commission's assessment of harm must be legally sound and as such may be considered fettered to a degree in what considerations they may contemplate. On the collection of data for the improvement of Facebook's advertising services, the Commission found that harm was unlikely. This related to WhatsApp not collecting data that was valuable to Facebook's advertisement services⁷⁹ because substantial technical difficulties would arise in the process of integrating the parties' available information⁸⁰. Furthermore, Facebook would continuously face competitive constraints by competitors post-merger⁸¹. Having established that there was no significant impediment to effective competition, the concentration was found to be compatible with the internal market.

The fact that *Facebook/WhatsApp* could have avoided review, acted as a triggering event for an increased focus on jurisdictional issues. The Commission will now have a new opportunity to review its procedures and set precedent through the in-depth investigation into *Apple/Shazam*⁸². As mentioned previously, only Austria captured this transaction and subsequently referred it to the Commission under Article 22 EUMR. The

⁷⁶ Facebook/WhatsApp (2014).

⁷⁷ Kadar and Bogdan (2017), at 482.

⁷⁸ Boutin and Boutin (2017), at para 26.

⁷⁹ Kadar and Bogdan (2017), at 482.

⁸⁰ Davilla (2017), at 375.

⁸¹ Kadar and Bogdan (2017), at 482.

⁸² Apple/Shazam (2018).

parties did not opt to request Commission jurisdiction under Article 4(5) EUMR, thus distinguishing the case from those previously discussed. The Commission Press Release IP/18/3505 recognises that both companies are well known market players. Current competitive concerns are the companies' market positions, Apple's access to Shazam's data following the acquisition and the effect this data could have on the market structure. One may thus argue that, whilst there are similarities to the *Google/DoubleClick* precedent as to the competitive appraisal, they differ as the Press Release implies an appraisal of long-term effects on market structure through available data. This may reflect concerns that Apple could hinder Shazam's ability to refer consumers to competitors such as Spotify, instead solely working with Apple Music. Furthermore, this may be a response to issues with *Facebook/WhatsApp*, but it may also signal an increased understanding within the Commission of the new-economy sector. At the same time, the overall discussion indicates that there are potential issues of false positives and false negatives with new-economy concentrations due to market volatility and the uncertainties of *ex ante* evaluation of future innovation. The analysis further implies that even when new-economy concentrations are subject to merger review, the assessment may not always be predictable or certain, as exemplified through Facebook's non-disclosure of the existence of the user matching technology, which they were later fined for⁸³.

2.4 Chapter Conclusion

The above discussion has presented the new-economy concept as one including the digital, biotechnological and pharmaceutical markets, all of which are fast-moving and innovation driven with high levels of R&D. In such markets, the market position as a strong competitor does not equate to having high turnover. This highlights a regulatory gap as the current EUMR thresholds are based solely on turnover for practicality and in line with the principle of subsidiarity. Hence, new-economy transactions may avoid, or be excluded from, review where one of the parties lacks sufficient turnover. The

⁸³ Case M.8228 – Facebook/WhatsApp [2017]. [cit. Facebook/WhatsApp (2017)].

actuality of this issue is seen through a number of transactions that failed to satisfy the thresholds, in particular *Facebook/WhatsApp* and the more recent *Apple/Shazam*.

The overall discussion highlights how horizontal overlaps do occur and do cause anti-competitive effects. The existence of such harmful effects validates, and increases, the need to ensure that the thresholds employed by the EUMR encompass new-economy transactions. This is especially so as large market players are involved in the transaction, yet their M&A activity escapes Commission appraisal due to target companies lacking sufficient turnover. This demonstrates that the regulatory gap for new-economy transactions is not fiction but a real consequence of the current system. Further issues arise as notification depends on the parties' desire to avoid multiple filings and the cost thereof. Moreover, such notification is currently reliant on referral mechanisms due to the inability to reach the EUMR thresholds. This may be particularly problematic as Article 4(5) EUMR, which allows parties to apply for Commission jurisdiction, may only be used where a transaction is capable of review in at least three Member States, thus not being an available option for transactions not captured in several jurisdictions. Furthermore, under Article 22 EUMR, whereby a Member State may refer a case to the Commission, there is no obligation on Member States to refer the case; they may however *choose* to do so. Consequently, the inefficiency of turnover-based thresholds to capture new-economy transactions may allow avoidance of Commission scrutiny.

3 The 'Size-of-Transaction' Model

The above discussion does not exist in a vacuum. The Commission implicitly recognised the potential need for reform in a recent public consultation on the effectiveness of the current EUMR thresholds⁸⁴. Here, the introduction of complementary thresholds based on the value of the transaction was inquired about. The aim of this chapter is to examine the model and whether it would be effective in ensuring that new-economy concentrations could be brought within the scope of the EUMR. In doing so it will examine the background of the consultation as well as the response to the consultation to consider stakeholders' opinions on reform. Finally, potential issues and problematic aspects of the model vis-à-vis new-economy transactions will be analysed.

3.1 Background to the Commission Consultation

This is not the first debate on the topic of thresholds due to their arbitrary and crude nature⁸⁵. The current consultation places an emphasis upon new-economy concentrations, in particular those within the digital market and the pharmaceutical industry⁸⁶. This may reflect that in recent years, these sectors have been subject to heightened attention from the Commission⁸⁷. The consultation asks for an evaluation of the potential need for reform of the turnover-based thresholds as well as opinions on the introduction of "complementary jurisdictional threshold(s) based on the value of the

⁸⁴ DG Comp, http://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html, (2016).

⁸⁵ N Levy, and C Cook, (2016). *European Merger Control Law: A Guide to the Merger Regulation Volume 1*. Matthew Bender & Co. [cit. Levy and Cook (2016)], at chapter 6, page 3.

⁸⁶ Pouncey and Fountoukakos and Rowland and Puech-Baron and Katrana and Maly, <https://globalcompetitionreview.com/insight/the-european-middle-eastern-and-african-antitrust-review-2018/1145620/european-union-merger-control>, (2018).

⁸⁷ Pouncey and Fountoukakos and Rowland and Puech-Baron and Katrana and Maly, <https://globalcompetitionreview.com/insight/the-european-middle-eastern-and-african-antitrust-review-2018/1145620/european-union-merger-control>, (2018).

transaction"⁸⁸. Such alternative criterion aims to "capture acquisitions involving certain young and innovative companies whose competitive potential is not adequately reflected in their turnover"⁸⁹.

The general debate is however not unanimous in recognising the current regulatory gap. Some consider the consultation merely as an unnecessary reaction to the *Facebook/WhatsApp* concentration, arguing that no reform is needed⁹⁰ and that reform may even be disproportionate⁹¹. Ultimately, *Facebook/WhatsApp* did not cause significant anti-competitive effects and the Article 4(5) EUMR referral was successful⁹².

However, *Apple/Shazam* demonstrates the risk of additional issues as a referral was not requested by the parties through Article 4(5) EUMR but rather by Member States through Article 22. One could argue that this highlights that *Facebook/WhatsApp* was not a unique case and that other concentrations may arise that *actually* give rise to significant anti-competitive effects. Combined with other factors, such effects might be to the extent that reform is necessary and justified. Ultimately, it must be ensured that the legislation in question, either on a centralised or decentralised level, is appropriate and capable to deal with such concentrations. Ensuring such functions is of a fundamental importance and in line with key Union

⁸⁸ Directorate-General for Competition, 'Evaluation of Procedural and Jurisdictional Aspects of EU Merger Control Consultation Document' (*European Commission*, 7 October 2016)

<http://ec.europa.eu/competition/consultations/2016_merger_control/consultation_document_en.pdf> accessed 2 February 2018. [cit. DG Comp, http://ec.europa.eu/competition/consultations/2016_merger_control/consultation_document_en.pdf, (2016)].

⁸⁹ Pouncey and Fountoukakos and Rowland and Puech-Baron and Katrana and Maly, <https://globalcompetitionreview.com/insight/the-european-middle-eastern-and-african-antitrust-review-2018/1145620/european-union-merger-control>, (2018).

⁹⁰ G Bushell, 'EU Merger Regulation Reform: No Smiles from the Threshold' (*Kluwer Competition Law Blog*, 24 October 2016)

<<http://competitionlawblog.kluwercompetitionlaw.com/2016/10/24/no-smiles-from-the-threshold-eu-merger-control-reform/>> accessed 26 January 2018. [cit. Bushell, <http://competitionlawblog.kluwercompetitionlaw.com/2016/10/24/no-smiles-from-the-threshold-eu-merger-control-reform/>, (2016)].

⁹¹ Pouncey and Fountoukakos and Rowland and Puech-Baron and Katrana and Maly, <https://globalcompetitionreview.com/insight/the-european-middle-eastern-and-african-antitrust-review-2018/1145620/european-union-merger-control>, (2018).

⁹² Bushell, <http://competitionlawblog.kluwercompetitionlaw.com/2016/10/24/no-smiles-from-the-threshold-eu-merger-control-reform/>, (2016).

objectives such as facilitating the internal market, maintaining an open market economy and preventing financial and consumer harm⁹³.

3.2 Response to the Consultation

In previous consultations, stakeholders have been positive to increased jurisdiction for the Commission⁹⁴. This indicates a preference of Commission assessment, perhaps in light of lesser associated costs, an altogether quicker process through the one-stop-shop and more legal certainty. Interestingly, in this consultation stakeholders seemingly lack interest in the proposal to introduce complementary size-of-transaction thresholds into the EUMR. Only a minority were in favour of reform to close the current regulatory gap⁹⁵. Here, reference was made to recent acquisitions of patent portfolios and smaller Internet companies⁹⁶. This arguably recognises that the value of the transaction may be a greater indicator of the target company's market worth and market potential⁹⁷.

The arguments of the majority instead focused on referral mechanisms in the EUMR, stating that such mechanisms decrease any regulatory gap in existing legislation⁹⁸. This demonstrates a view that no issue exists as Member States' systems capture all such transactions; however, this ignores the key prerequisite of *if* concentrations actually are caught under national legislation *to be* referred to the EU. Nevertheless, one should not ignore the instances of both Article 22 and Article 4(5) EUMR referrals, seen in previous sections. Additionally, the response may be questionable from the perspective that stakeholders may want to exclude transactions from actual and serious review by the Commission⁹⁹. As such, responses to the Commission

⁹³ (2)-(5) Preamble, EUMR.

⁹⁴ C Jones, 'The European Dimension in Competition Policy' (London, 21 January 1997). Available at <http://ec.europa.eu/competition/speeches/text/sp1997_008_en.html> accessed 25 January 2018. [cit. Jones (1997)].

⁹⁵ Commission, Summary of Replies to the Public Consultation, (2017), at 4.

⁹⁶ Commission, Summary of Replies to the Public Consultation, (2017), at 5.

⁹⁷ H Stakheyeva, and F Toksoy, 'Merger Control in the Big Data World: to be or not to be Revisited?' [2017] 38(6) European Competition Law Review. [cit. Stakheyeva and Toksoy (2017)], at 267.

⁹⁸ Commission, Summary of Replies to the Public Consultation, (2017), at 5.

⁹⁹ F Dethmers, 'EU Merger Control: Out of Control?' [2016] 37(11) European Competition Law Review. [cit. Dethmers (2016)], at 435.

consultation should be read critically as there may be underlying motives to specific responses.

3.3 Problematic Aspects

3.3.1 Limitations of Quantitative Thresholds

Reading the arguments against reform critically results in questioning if they relate to the lack of a perceived regulatory gap or if it is rather an unwillingness to introduce jurisdictional thresholds based on the size of the transaction. Arguably, such 'size of transaction' measurements go towards the same factors as the current turnover-based thresholds in looking at quantitative data; however, this model looks at what acquiring parties are willing to pay¹⁰⁰ and makes the assumption that the price of a merger or acquisition is expressive of the competitive effects on the market¹⁰¹.

However, one should not ignore that in a transaction process, the price paid for an acquisition is a result of considering several factors such as the due diligence conducted, risks associated with the transaction, the planned longevity if an investment as well as potential liability assumed by the purchaser. Furthermore, within the new-economy one must consider that target companies may be weaker in negotiations, thus decreasing the price of a strategic acquisition that may have anti-competitive effects¹⁰². Although evaluating the worth of an acquisition by the purchaser may be more efficient in capturing new-economy transactions, such evaluations are also complex and subjective¹⁰³.

Furthermore, such thresholds could also result in the need to change the M&A process as agreements may contain mechanisms for correction of price post-transaction¹⁰⁴ or where one needs to make a subsequent valuation

¹⁰⁰ Broberg (2014), at 266.

¹⁰¹ R Burnley, 'An Appropriate Jurisdictional Trigger for the EC Merger Regulation and the Question of Decentralisation' [2002] 25(3) *Kluwer Law International*. [cit. Burnley (2002)], at 271.

¹⁰² Boutin and Boutin (2017), at para 59.

¹⁰³ Bushell, <http://competitionlawblog.kluwercompetitionlaw.com/2016/10/24/no-smiles-from-the-threshold-eu-merger-control-reform/>, (2016).

¹⁰⁴ Bushell, <http://competitionlawblog.kluwercompetitionlaw.com/2016/10/24/no-smiles-from-the-threshold-eu-merger-control-reform/>, (2016).

of non-monetary forms of considerations¹⁰⁵. Existing corrective mechanisms create a further issue for the size-of-transaction model as the value of the transaction may change over time, especially in light of the new-economy sector consisting of fast-moving markets¹⁰⁶. This is not a hypothetical scenario; looking to *Facebook/WhatsApp*, part of the purchase price was paid through shares in Facebook, however, the value of Facebook shares had increased by the time of closing leading to an increase of price from 19 billion USD to circa 21.8 billion USD¹⁰⁷. What effect would this have were the threshold set at 20 billion USD? Thus, this model requires a regulatory decision regarding the situation where the pre-closing value does not satisfy the threshold, but the post-closing value does.

3.3.2 Forum-Shopping

The issue of fluctuations in value, and price paid, create further difficulties for the size-of-transaction model as it accommodates forum-shopping by allowing parties to set the price depending on whether they want the Commission or National Competition Authority (henceforth ‘NCA’) to investigate the transaction¹⁰⁸. With volatile markets come the possibility that there will be an increase in share-value when announcing a future acquisition, therefore, despite setting a lower price, the worth can rise substantially until the time of closing. The competitive value of a transaction may be seen more clearly where thresholds look at the monies a party is willing to pay. However, it cannot be ignored that the value of a transaction is a subjective consideration, based on varying factors, but ultimately set by the parties. Arguably, the relative ease to tamper with pricing mechanisms would

¹⁰⁵ Boutin and Boutin (2017), at para 59.

¹⁰⁶ Bushell, <http://competitionlawblog.kluwercompetitionlaw.com/2016/10/24/no-smiles-from-the-threshold-eu-merger-control-reform/>, (2016).

¹⁰⁷ P Olson, 'Facebook Closes \$19 Billion WhatsApp Deal' (*Forbes*, 6 October 2014) <<https://www.forbes.com/sites/parmyolson/2014/10/06/facebook-closes-19-billion-whatsapp-deal/#672428155c66>> accessed 13 February 2018. [cit. Olson, <https://www.forbes.com/sites/parmyolson/2014/10/06/facebook-closes-19-billion-whatsapp-deal/#672428155c66>, (2014)].

¹⁰⁸ Bushell, <http://competitionlawblog.kluwercompetitionlaw.com/2016/10/24/no-smiles-from-the-threshold-eu-merger-control-reform/>, (2016).

increase the likelihood of forum-shopping significantly¹⁰⁹. The current turnover-based system does not exclude forum-shopping, but it is of a limited nature. This may occur due to the parties' ability to limit what turnover is included in the jurisdictional assessment through purchasing only parts of another undertaking¹¹⁰.

Under the current system, such forum-shopping may also exist where the relevant undertaking performs pre-signing divestitures, thus limiting their size prior to notification¹¹¹. However, one may argue that both prior divestitures and purchasing only a part of an undertaking, result in a decreased likelihood of anti-competitive effect and, therefore, one must ensure that the turnover represents such decreased likelihood. In the case of forum-shopping, through intentionally setting a lower purchasing price, this does not reflect a decreased competitive effect¹¹² but rather entertains parties' desire to decide under what authority's jurisdiction the concentration will fall.

3.4 Sole EU Regulation of New-Economy Transactions

So far, this thesis has demonstrated that there are problematic aspects that result in the success of size-of-transaction thresholds in the EUMR being questionable. There remains the fundamental issue that only the largest transactions would be targeted due to the division of jurisdiction between Member States and the Commission as well as the nature of quantifiable thresholds. Just as with turnover-based thresholds, such delimitation arguably relates to principles such as Member State sovereignty, EU subsidiarity and the notion of Union dimension.

The inclusion of complementary thresholds based on the value of the transaction would likely aim at the largest cross-border concentrations¹¹³, however one must question if the largest transactions are always the ones that

¹⁰⁹ Stakheyeva and Toksoy (2017), at 267.

¹¹⁰ Broberg (2013), at 228.

¹¹¹ IV/M.278 – British Airways/Dan Air [1993]. [cit. British Airways/Dan Air (1993)].

¹¹² Boutin and Boutin (2017), at para 44.

¹¹³ See to this effect M Bishop, and J Kay, (1993). *European Mergers & Merger Policy*. Oxford University Press [cit. Bishop and Kay (1993)], at 295, on the same topic but within the context of turnover-based thresholds.

are harmful, which is particularly important in light of the forum-shopping possibilities highlighted above. Furthermore, one may question if such thresholds risk externalising the harmful effects and costs¹¹⁴ of new-economy transactions that are not captured by the complementary thresholds. However, there can be no true externalisation within the EU due to the internal market. The harmful effects and costs still take place within this market and may have particularly harsh effects on individual national markets. One may consequently establish, in light of the internal market, that there are negative spill-over effects where new-economy concentrations are not properly regulated. Such spill-over effects arise by economic conditions being altered by economic activity in other jurisdictions¹¹⁵. Consequently, one may argue that where new-economy transactions are not regulated on a national level it may affect other national jurisdictions, in varying degrees, thus impacting the internal market as well. This may be the ultimate result of sole EU reform in light of new-economy transactions. This demonstrates a need to examine if national merger control systems safeguard against harmful new-economy transactions.

Reform is all the more important when considering the potential flaws of the size-of-transaction model vis-à-vis new-economy transactions, as discussed above. These inefficiencies lead to a continued reliance, albeit to a potentially lesser extent than under the current turnover-based thresholds, upon Member States' national merger control systems and referrals under Articles 4(5) and 22 EUMR. The mechanism contained in Article 22, whereby Member States may refer a case to the Commission, partly decrease the success of forum-shopping¹¹⁶. However, it is an inefficient tool if national systems are unable to capture new-economy transactions due to a lack of appropriate thresholds in national law. This has increased merit when few Member States demonstrate an ability to capture such transactions, seen through *Apple/Shazam* being captured only by Austria¹¹⁷. Consequently,

¹¹⁴ Bishop and Kay (1993), at 310.

¹¹⁵ Burnley (2002), at 265.

¹¹⁶ Commission Notice on Case Referral, 2005 O.J. C 56/02. [cit. Commission Notice on Case Referral (2005)], at para 4.

¹¹⁷ Commission, Press Release IP/18/664, (2018); *Apple/Shazam* (2018).

without ensuring that national merger control systems are capable of capturing new-economy transactions, a false trust and reliance is placed upon Article 22 referrals and Member States' merger control systems.

3.5 Chapter Conclusion

In response to the regulatory gap in regards to new-economy transactions recently viewed at EU level, the Commission launched a consultation on the inclusion of complementary thresholds in the EUMR that follow a size-of-the-transaction model and look at the price paid for an acquisition. The majority of respondents argued against the existence of a regulatory gap in light of the operation of Article 22 EUMR. However, such feedback disregards the vital question of *whether* concentrations are actually caught on a Member State level in the first place to enable referral to the Commission. Thresholds based on the value of a transaction may be better at depicting the competitive worth of a concentration. However, such a system is not flawless.

The introduction of size-of-transaction thresholds would do little to close the regulatory gap as regards new-economy transactions as it primarily looks at the size, rather than the effect, of the transaction. As such, the proposed model would fail in bringing new-economy concentration under the EUMR's scope to a satisfactory degree. Moreover, there may be uncertainties as to how, and when, one calculates the price of the transaction. Furthermore, there is a substantial risk of forum-shopping within this model as the price paid is subjective and set by the parties themselves.

It is also argued that for the purpose of regulating new-economy transactions, one needs to look beyond implementing thresholds only on an EU level. Otherwise, it may result in a system where only the largest concentrations would be captured and forum-shopping would likely increase if the sector is only regulated within the EUMR. Furthermore, disregarding an examination of national systems' capability to bring new-economy transactions within merger control would result in a false trust and reliance on the operability of Article 4(5) and Article 22 EUMR as safeguards. This leads to further motive and initial justification in examining the potential regulatory gap in national merger control in the following chapter.

4 Need for National Reform

Thresholds based on the value of the transaction may not be optimal to capture new-economy transactions, but it *is* a legislative step to minimise the existing regulatory gap. However, one must also consider the potential necessity for reform on a national level to cover the entire scope of transactions that may affect the internal market. This is a particular issue for new-economy transactions as there are currently few Member States that employ other thresholds than those based on turnover. The aim of this chapter is to examine the need to implement thresholds capable of capturing new-economy transactions under national merger control. Legislative reform may follow logically from EU reform. Where alternative thresholds are not implemented into the EUMR, national reform could otherwise help strengthen the framework under Article 22 EUMR. The chapter will firstly look at the current state of national safeguards and the need for national safeguards, it will then examine possible harmonisation under Article 114 of the Treaty on the Functioning of the European Union (henceforth ‘TFEU’) along with the effect of the internal market. The chapter subsequently examines the possibility for reform through the process of spontaneous harmonisation and lastly highlights problematic aspects with potential national reform.

4.1 Current State of National Safeguards

There are currently two Member States where thresholds specifically aimed at capturing new-economy transactions can be found: Germany and Austria. Germany introduced a new duty to notify in 2017¹¹⁸ where the value exceeds 400 million EUR and the target company conducts significant activities in Germany¹¹⁹. Further changes were also made to ensure that new-economy transactions, specifically those within digital markets, could be captured by specifying that not having generated turnover yet does not hamper the

¹¹⁸ Gesetz gegen Wettbewerbsbeschränkungen in der Fassung der Bekanntmachung vom 26. Juni 2013 (BGBl. I S. 1750, 3245), das zuletzt durch Artikel 10 Absatz 9 des Gesetzes vom 30. Oktober 2017 (BGBl. I S. 3618) geändert worden ist. [cit. GWB (2017)].

¹¹⁹ GWB (2017), at s 35.

creation of a notifiable concentration¹²⁰. Thus, three things should be noted. Firstly, this highlights recognition on a national level of the potential harm that new-economy concentrations present and the need to legislate to ensure NCAs have the option to assess such concentrations. Secondly, the German reform demonstrates potential complexities in aligning national merger control as it may involve changes to definitions, legal guidance and procedure. One such example is that a very broad definition is used as regards the calculation of the transaction-value¹²¹, whereby it includes all assets and other monetary benefits received by the sellers¹²². Such broad definitions may in turn lead to the need for extensive guidance on the proper assessment of valuing assets, demonstrating the potential legislative burdens put onto Member States in such situations. Thirdly, there were concerns within Germany that the addition of these thresholds would have a negative impact on start-up companies, however no such effect has yet been seen according to scholarship and research¹²³. Furthermore, one may question to what extent very young start-ups are likely to be impacted, leading to potential impact on business overall, through the threshold being set at 400 million EUR¹²⁴. The absence of such an effect is likely to negate political and economic arguments against the introduction of alternative thresholds.

Similar legislative reform has been done in Austria where secondary thresholds based on the value of the transaction were introduced to target new-economy transactions¹²⁵. It follows a similar structure as the German one; combining turnover and the value of the transaction and creates a local nexus criterion through requiring activities in Austria¹²⁶. Here one may again note that there is a need for further clarification to specify the degree of activity required to satisfy the threshold¹²⁷. These legislative changes may

¹²⁰ J Scholl, 'Why the New Merger Control Thresholds in Germany?' [2017] 8(4) *Journal of European Competition Law & Practice*. [cit. Scholl (2017)], at 219.

¹²¹ Sauermann (2017), at 430.

¹²² *GWB* (2017), at s 38.

¹²³ Scholl (2017), at 219.

¹²⁴ Sauermann (2017), at 430.

¹²⁵ N Harsdorf, 'Digital Economy: New Test in Austrian Merger Control' [2017] 8(7) *Journal of European Competition Law & Practice*. [cit. Harsdorf (2017)], at 421.

¹²⁶ *Bundesgesetz gegen Kartelle und andere Wettbewerbsbeschränkungen*. [cit. *Kartellgesetz* (2005)], at 3 § 9.

¹²⁷ Scholl (2017), at 421.

arguably bring more transactions within the scope of national merger control, not solely new-economy transactions, which one may argue could increase monetary burdens for businesses and increase the workload of NCAs¹²⁸. At the same time, one may point to the fact that prohibition decisions are likely to continue as the exception, rather than the general rule¹²⁹.

4.2 Need for National Safeguards

Ultimately, merger control rules regarding notification establishes what transactions are reviewable by NCAs. Where a transaction falls outside the applicable national legislation it cannot be reviewed or assessed by NCAs meaning that anti-competitive effects may occur on the market causing harm to consumer welfare and competition¹³⁰. In regards to new-economy transactions such harm may have far-reaching consequences because of their global nature and fast-moving markets. Whilst reform to the EUMR is desirable, it is likely to only capture the largest transactions leaving the remainder to Member States. As such, a large portion of the internal market may remain unprotected if no reform is made on a national level.

The replies to the Commission consultation reveals recognition of this need for reform. The majority argued that referral mechanisms under the EUMR would be sufficient protection against new-economy transactions, however, it was also pointed out that the success of such mechanisms "depends on the existence of non-turnover-based notification thresholds in at least *some* Member States"¹³¹. This recognises the need for alternatives to turnover-based systems. Importantly, it also implies a more general need for reform on a national level, and could be used to argue that whilst the reforms in Germany and Austria are again steps in the right direction, two Member States alone might not provide for sufficient protection. This is heightened in light of the fact that transactions with broad implications are currently falling

¹²⁸ Y Karagök, and S Rutz, 'Towards Optimal Merger Notification Regimes: Evidence from Switzerland' [2014] 2(2) Journal of Antitrust Enforcement. [cit. Karagök and Rutz (2014)], at 453.

¹²⁹ Scholl (2017), at 219.

¹³⁰ Karagök and Rutz (2014), at 453.

¹³¹ Commission, Summary of Replies to the Public Consultation, (2017), at 5.

outside the scope of the EUMR and thus are more likely to be assessed on a national level¹³². At the same time, the need for safeguards arguably stretches to the adoption of alternative thresholds, or amendment of the ones in place, to capture new-economy concentrations. The convergence may not need to concern the exact thresholds in the sense that divergence on the exact amounts may more accurately reflect national economies and industries.

4.3 Article 114 TFEU and the Internal Market Effect

Historically, the EU has been widely active as regards harmonisation. On the topic of merger control, however, questions regarding the boundary between Member State and EU competence are not a new occurrence¹³³. In the past, France, Germany and the UK opposed the introduction of merger control into EU competition law by relying on principles of sovereignty and subsidiarity¹³⁴. A compromise arose whereby there is a mutually exclusive jurisdiction between NCAs and the Commission, primarily based on turnover-based thresholds, an approach generally considered clear, objective and user-friendly¹³⁵. Consequently, all Member States have *national* regulations, most of which are based on turnover¹³⁶. Over time, the thresholds, combined with the referral mechanisms, have managed to establish a framework for allocating jurisdiction between the Commission and Member States¹³⁷. The EUMR has also evolved into one of the cornerstones of EU competition law and a pillar of the internal market by ensuring uniformity in merger control on a centralised level¹³⁸.

¹³² Levy and Cook (2016), at chapter 6, page 4.

¹³³ Neven and Nuttal and Seabright (1993), at 197.

¹³⁴ Broberg (2014), at 261.

¹³⁵ Broberg (2014), at 261.

¹³⁶ E Trogen, 'Multi-jurisdictional Filing Processes – Towards Further Convergence?' [2012] 33(5) European Competition Law Review. [cit. Trogen (2012)], at 237.

¹³⁷ European Commission, Communication from the Commission to the Council, Report on the functioning of Regulation No 139/2004 [2009]. [cit. Commission, Report on the Functioning of EUMR, (2009)], at page 7, para 23.

¹³⁸ European Commission, White Paper: Towards More Effective EU Merger Control (Text with EEA Relevance), COM(2014) 449 final (July 2014). [cit. Commission, White Paper, (2014)], at page 4, para 5.

However, competition law has become more than a tool for ensuring uniformity, it also was and remains a tool for promoting integration within the internal market¹³⁹. As such, competition law becomes tied to a fundamental goal of the EU¹⁴⁰ which confers dynamic and robust legal authority¹⁴¹ onto the EU to take action. Within merger control there is potentially a large interest in maintaining national control and national systems, creating opposition to centralisation¹⁴². Whilst the Commission is not solely responsible for safeguarding the market¹⁴³, the connection with the internal market creates a situation where Member States may have lessened autonomy as EU law "grants a functionally driven reach...which does much to weaken in *practice* the reliability of the *principle* of conferral"¹⁴⁴. Such functionality results in allowing harmonisation of any national law¹⁴⁵, the requirement is that it is connected to the establishment or functioning of the internal market¹⁴⁶. Thus, one could argue that EU power to harmonise arises where there is an injurious impact on the internal market through diversity in national law¹⁴⁷, but it must be appreciable in regards to competition¹⁴⁸.

Consequently, it becomes necessary to tie the failure to capture new-economy transactions with an appreciable harm on the internal market. From the previous chapters one can establish, due to the nature of the new-economy sector, that where harm arises it is likely to have a prolonged effect within the sector that will ultimately affect consumer welfare and competition on the market. Anti-competitive harm arising out of new-economy concentrations may also become increasingly pertinent as the modern economy continues to evolve¹⁴⁹. However, such harm may be difficult to establish without risks of

¹³⁹ O Budzinski, and A Christiansen, 'Competence Allocation in the EU Competition Policy System as an Interest-Driven Process' [2005] 25(3) *Journal of Public Policy*. [cit. Budzinski and Christiansen (2005)], at 317.

¹⁴⁰ Article 3, TEU.

¹⁴¹ S Weatherill, (2017). *The Internal Market as a Legal Concept*. Oxford University Press. [cit. Weatherill (2017)].

¹⁴² Budzinski and Christiansen (2005), at 317.

¹⁴³ Budzinski and Christiansen (2005), at 322.

¹⁴⁴ Weatherill (2017), at 4.

¹⁴⁵ Weatherill (2017), at 154.

¹⁴⁶ Article 114, TFEU.

¹⁴⁷ Weatherill (2017), at 11.

¹⁴⁸ Weatherill (2017), at 173.

¹⁴⁹ Boutin and Boutin (2017), at para 33.

false positives or false negatives. It may be argued that the harm of new-economy transactions is, whilst potentially very harmful, actually *potential* in view of the legal definition of harm¹⁵⁰. As such, it is hard to promote a harmonisation measure under Article 114 TFEU, especially considering the historical opposition to EU harmonisation within merger control. A further issue with a harmonisation approach is that it implies a 'competence creep' by the EU in assuming broader jurisdiction within merger control¹⁵¹. This may be critiqued from the perspective of legitimacy and sovereignty as well as being politically sensitive against the backdrop of Brexit.

New-economy transactions may cause severe harm, but importantly, harm does not arise in every transaction. However, the internal market entails *undistorted competition*¹⁵², and based on the cases discussed in chapter 2 one can establish that not capturing new-economy concentrations does endanger this. In line with the principle of sincere cooperation¹⁵³ and the internal market one may then argue that there is a duty to take legislative steps to capture such concentrations¹⁵⁴. However, it is argued that such legislative steps do not necessarily need to stem from the EU, but rather that the effect of the internal market is such as to demand that Member States take their own legislative action. This is especially the case as within specialised areas, such as pharmaceutical and biotechnology, companies' M&A activity may play a key role on the market and internal market¹⁵⁵. The internal market objective is an overarching Treaty objective, and its maintenance is a Treaty obligation¹⁵⁶. One may also argue that competition, and a competitive market, is a Union objective in itself¹⁵⁷. Arguably, the internal market thus implicitly creates a duty to ensure that merger control thresholds capture new-economy

¹⁵⁰ Boutin and Boutin (2017), at para 33.

¹⁵¹ Weatherill (2017), at 180.

¹⁵² Protocol (No 27) on the Internal Market and Competition, 2012 O.J. C 326/01. [cit. Protocol No 27].

¹⁵³ Article 4(3), TEU.

¹⁵⁴ R Kassamali, 'From Fiction to Fallacy: Reviewing the E.C. Merger Regulation's Community-dimension Thresholds in the Light of Economics and Experience in Merger Control' [1996] 21 European Law Review. [cit. Kassamali (1996)], at 8.

¹⁵⁵ Kassamali (1996), at 11.

¹⁵⁶ Article 26 TFEU; Article 3(3) TEU read in conjunction with the principle of sincere cooperation in Article 4(3) TEU.

¹⁵⁷ W Sauter, (2016). *Coherence in EU Competition Law*. Oxford University Press. [cit. Sauter (2016)], at 73.

transactions. On the other hand, in line with the principle of proportionality, it may not be required to implement entirely new merger control legislation. What may be required is ensuring that national merger control systems are capable of capturing new-economy transactions and that divergence from EU legislation and the EUMR is proportional¹⁵⁸. This idea is further strengthened through the fact that national law may not "undermine the operation of the internal market"¹⁵⁹, which is both a positive and negative duty¹⁶⁰.

Whilst full harmonisation may be favourable to avoid having differing national criteria applied in parallel to the same merger¹⁶¹ it is possibly politically unrealistic¹⁶² and could be hard to justify within the criteria of Article 114 TFEU. This results in the necessity to move away from an argument regarding harmonising measures within merger control and rather look towards an organic and incremental convergence through the process of spontaneous harmonisation. This approach avoids issues such as an increase or respective decrease of jurisdiction or scope of either EU or national agencies. Yet it maintains the strengthening of the European merger control system through the implementation of national reforms.

4.4 The Incremental Approach

4.4.1 Spontaneous Harmonisation

Having established that there is a need and basis for taking legislative steps towards protecting against harmful new-economy concentrations, one may look at the likelihood of that happening. Almost 30 years after the introduction of the first Merger Regulation, all Member States have set up NCAs and national merger laws; generally these are quite similar to the

¹⁵⁸ F Rizzuto, 'National Merger Control Proceedings and the Requirements of European Community Law: the Limits to Exclusive Jurisdiction' [2008] 29(12) European Competition Law Review. [cit. Rizzuto (2008)], at 704.

¹⁵⁹ Rizzuto (2008), at 709.

¹⁶⁰ C-265/95 Commission v French Republic [1997] ECLI:EU:C:1997:595. [cit. Commission v French Republic (1997)].

¹⁶¹ D Neven, and R Nuttal, and P Seabright, (1993). *Merger in Daylight: the Economics and Politics of European Merger Control*. Centre for Economic Policy Research. [cit. Neven and Nuttal and Seabright (1993)], at 196.

¹⁶² Neven and Nuttal and Seabright (1993), at 178.

Commission's and EU's competition law system¹⁶³. This creates a situation whereby potential reform on an EU level may incrementally be adopted or reflected in national merger control systems, thus creating the necessary increased safeguards against new-economy transactions.

Such reflections may be referred to as 'spontaneous harmonisation'¹⁶⁴, a sort of osmosis or approximation process¹⁶⁵, whereby a voluntary alignment occurs through Member States' initiative within national merger control systems to the EUMR regarding procedural and substantive criteria¹⁶⁶. This has resulted in all Member States appraising concentrations on the basis of dominance and versions of the Significant Impediment to Effective Competition (henceforth 'SIEC') test¹⁶⁷ as well as having similar requirements regarding notification obligations¹⁶⁸. Other international bodies, such as the International Competition Network (henceforth 'ICN') and the Organisation for Economic Co-operation and Development (henceforth 'OECD'), have also created recommendations and procedural guides that help foster co-operation and contribute to international convergence within merger control, similar to the Best Practices of the Commission¹⁶⁹.

As such one may note how the Commission has assumed a leader role¹⁷⁰ and acts as a driving force for spontaneous harmonisation¹⁷¹, using the EUMR as a model¹⁷². However, there "remains room for further (...) convergence"¹⁷³, demonstrating the incremental nature of spontaneous harmonisation. The Commission may act as a leader, and its practices and decisions constitute guidance within the Union; the issue then becomes that

¹⁶³ OECD, 'Country Studies: European Commission – Peer Review of Competition Law and Policy' [2005]. Available at <<http://www.oecd.org/eu/35908641.pdf>> accessed 27 February 2018. [cit. OECD, Country Studies, (2005)], at 13.

¹⁶⁴ Sauter (2016), at 196.

¹⁶⁵ Jones (1997).

¹⁶⁶ Rizzuto (2008), at 693.

¹⁶⁷ Though differences do exist regarding how this is appraised as well as other policy grounds and considerations.

¹⁶⁸ Rizzuto (2008), at 694.

¹⁶⁹ Trogen (2012), at 237-238.

¹⁷⁰ P Barros, and J Clougherty, and J Seldeslachts, 'Europeanization of EU Member-State Competition Policy: The Commission's Leadership Role' [2013] 34 *International Review of Law and Economics*. [cit. Barros and Clougherty and Seldeslachts (2013)], at 42.

¹⁷¹ Trogen (2012), at 239.

¹⁷² Commission, White Paper, (2014), at page 7, para 18.

¹⁷³ Commission, White Paper, (2014), at page 7, para 19.

reform to EUMR thresholds may take a long time to filter down into Member States' legal orders. One potential issue with the process of spontaneous harmonisation as a method for implementing national reform regards its voluntary nature.

Spontaneous harmonisation is a process that is initiated by Member States, as such there may be room for protectionism or a public-choice theory. However, spontaneous harmonisation is also a process that can be evidenced by practice over recent decades where, at least within merger control, it is difficult to find evidence of such self-serving practice. Furthermore, as has been eluded through in previous sections, it may not be necessary for all Member States to reform their merger control systems but, rather, enough Member States to ensure that a reliance on the referral mechanisms in the EUMR may be justified and large, medium and small new-economy transactions may be captured to cover a wider scope of the market. Furthermore, the incremental approach is more organic and minimises issues such as a competence creep and debates regarding sovereignty, thus becoming a central and likely method for more Member States to start safeguarding against new-economy concentrations.

4.4.2 The Swedish Example

To demonstrate the operation of spontaneous harmonisation further one may use Sweden and the Swedish Competition Authority's Konkurrensverket (henceforth 'KKV') as a case study. There have been successive changes within Swedish merger control, leading to an incremental convergence with EU rules¹⁷⁴, and KKV are generally responsive to reforms on an EU level¹⁷⁵. The EUMR, Court of Justice of the European Union (henceforth 'CJEU') precedent and Commission praxis thus holds a central role in both present law as well as its future development¹⁷⁶. Such impact is not solely theoretical; the Swedish rules consider CJEU precedent as guiding interpretation of the

¹⁷⁴ U Bernitz, 'Reformen av EG:s konkurrensrätt: Vad blir effekterna för den nationella konkurrensrätten?' [2006] 3 Europarättslig Tidskrift. [cit. Bernitz (2006)], at 440.

¹⁷⁵ Bernitz (2006), at 441.

¹⁷⁶ E Eklund, and H Andersson, 'Den nya konkurrenslagen' [2009] 3(8) Ny Juridik. [cit. Eklund and Andersson (2009)], at 9.

Swedish law as well¹⁷⁷ and Commission actions as procedural guidance¹⁷⁸. The procedural influence exerted by the EU onto the Swedish system can be further seen through the recent amendment¹⁷⁹ to the Swedish Competition Act¹⁸⁰. The amendment grants KKV further decisional powers as it allows them to make prohibitive decisions regarding a concentration, without the need to apply for such a decision to court as was the procedure before¹⁸¹. Extending the role of KKV intends to increase clarity, transparency and strengthen the agency's functions¹⁸², and simultaneously have only a minor impact on the notified concentrations¹⁸³. More relevant however, is that through the amendment one notes further alignment between KKV and the Commission. The decisional practice and procedure thus conforms more directly with the procedure and powers held by the Commission, demonstrating how spontaneous harmonisation carries long-term, yet incremental, effects.

The Swedish Competition Act substantively appraises concentrations through the SIEC test and dominance¹⁸⁴, a duty to notify a concentration arises based on turnover¹⁸⁵. This arises where the parties have a combined turnover in Sweden that exceeds 1 billion SEK and at least two of the relevant parties, individually, have a turnover in Sweden that exceeds 200 million SEK¹⁸⁶. However, where there are particular concerns, KKV may oblige a party to notify the concentration, even where the lower threshold of 200 million SEK is not met. Parties are also free to notify a concentration voluntarily subject to a combined turnover in Sweden exceeding 1 billion SEK¹⁸⁷. Special causes here refers to smaller acquisitions that the law needs

¹⁷⁷ Patent- och Marknadsdomstolen, PMT 7499-16 Powerpipe. [cit. Powerpipe (2016)].

¹⁷⁸ V Bastidas, 'Lagkommentar: Konkurrenslag (2008:579) 4 kap. 1 §' [2017] Lexino. [cit. Bastidas (2017)].

¹⁷⁹ SFS 2017:986 Lag om ändring i konkurrenslagen (2008:579). [cit. SFS 2017:986 Lag om ändring i konkurrenslagen].

¹⁸⁰ SFS 2008:579 Konkurrenslag (2008:579). [cit. SFS 2008:579 Konkurrenslag].

¹⁸¹ KKV, Promemoria Dnr 543/2017 (November 2017). [cit. KKV, Promemoria Dnr 543/2017, (2017)], at 1.

¹⁸² KKV, Promemoria Dnr 543/2017, (2017), at 1.

¹⁸³ KKV, Promemoria Dnr 543/2017, (2017).

¹⁸⁴ SFS 2008:579 Konkurrenslag, 4 kap 1 §.

¹⁸⁵ SFS 2008:579 Konkurrenslag, 4 kap 6 §.

¹⁸⁶ SFS 2008:579 Konkurrenslag, 4 kap 6 §.

¹⁸⁷ SFS 2008:579 Konkurrenslag, 4 kap 7 §.

to safeguard against due to policy considerations such as public policy or consumer welfare¹⁸⁸. This may arise where a dominant, or strong, company acquires a start-up to hinder future competitive constraints¹⁸⁹. Thus, there is a form of residual jurisdiction that in theory could be used to capture new-economy transactions. However, one should also be wary as residual application may carry substantive legal uncertainty; a residual application entices a voluntary notification to ensure that there is no need to later dissolve an implemented concentration. Nevertheless, it is recognised by KKV that turnover-based thresholds alone may suffer flaws, particularly within the big data sector due to the ability for market dominance despite low levels of turnover¹⁹⁰, and there is a need for consistent and effective monitoring for KKV to be aware of transactions that require them to oblige the parties with a duty to notify¹⁹¹. It should be further noted that KKV recognises that factors such a company's worth or amount of consumers may be more telling of potential market power¹⁹².

The potential harm of new-economy transactions, flaws in notification systems and potential need for reform was especially noted by KKV during 2016 where two different concentrations in the new-economy sector both evaded the thresholds. One of those cases was the proposed acquisition of Hemnet by Blocket, companies active as online search engines for housing¹⁹³. Blocket's bid was 1,5 billion SEK¹⁹⁴ which arguably did not reflect Hemnet's

¹⁸⁸ K Carlsson, 'Lagkommentar: Konkurrenslag (2008:579), 4 kap. 7 §' [2017] Karnov Lagkommentar. [cit. Carlsson (2017)].

¹⁸⁹ Carlsson (2017).

¹⁹⁰ KKV, 'Konkurrens och tillväxt på digitala marknader: Ett regeringsuppdrag om e-handel och delningsekonomi, Konkurrensverkets Rapportserie 2017(2) (March 2017). [cit. KKV, 'Konkurrens och tillväxt på digitala marknader, (2017)], at 142.

¹⁹¹ KKV, 'Nya digitala marknader förbättrar konkurrensen' (*Konkurrensverket*, March 2017) <<http://www.konkurrensverket.se/nyheter/nya-digitala-marknader-forbatttrar-konkurrensen/>> accessed 5 April 2018. [cit. KKV, <http://www.konkurrensverket.se/nyheter/nya-digitala-marknader-forbatttrar-konkurrensen/>, (2017)].

¹⁹² KKV, 'Konkurrens och tillväxt på digitala marknader, (2017), at 142.

¹⁹³ Dnr 84/2016 – Blocket/Hemnet. [cit. Blocket/Hemnet (2016)].

¹⁹⁴ M Billing, 'Schibsted tar in USA-advokater för att rädda Hemnet-affären' (*Digital*, 2 June 2016) <<https://digital.di.se/artikel/schibsted-tar-in-usa-advokater-for-att-radda-hemnet-affaren>> accessed 22 March 2018. [cit. Billing, <https://digital.di.se/artikel/schibsted-tar-in-usa-advokater-for-att-radda-hemnet-affaren>, (2016)].

turnover in 2016 being below 200 million SEK¹⁹⁵. Both cases lead to in-depth reviews by KKV and both transactions were abandoned by the parties. Interestingly, the transactions were notified to KKV on a voluntary basis¹⁹⁶ demonstrating that the three-tier notification system¹⁹⁷ in place in Sweden has a certain degree of functionality in regards to new-economy transactions.

However, it also exemplifies the problematic nature of managing to capture new-economy transactions under merger control on a national basis. Firstly, issues of legal uncertainty arise where notifications may be made on a voluntary basis and may well be avoided through international companies choosing to ring-fence¹⁹⁸ the jurisdiction in question. Secondly, albeit turnover levels are set lower on a national level, which may be positive in a new-economy setting, than EU level; they are usually tied to the jurisdiction to create a local nexus¹⁹⁹. This creates a potential issue with allocating geographic turnover, particularly in regards to online businesses. Thirdly, the system is not flawless as KKV has noted several transactions that have managed to evade the system and where they have not been able to use their mandate to oblige parties to notify²⁰⁰. Potential solutions have been considered by the authority whereby thresholds would consider the value of transactions. Nonetheless, KKV has also recognised the difficulties with a dependency on the value due to its subjective nature, causing further tiers to the notification system and potential uncertainty as to which tier would apply, the vast difference in transaction sizes across industries and forum-shopping. Consequently, KKV has taken a positive stance to the Commission inquiry

¹⁹⁵ Alla Bolag, 'HemNet Sverige AB' (*AllaBolag.se*, 5 March 2018)

<<https://www.allabolag.se/5565360202/hemnet-sverige-ab>> accessed 22 March 2018.

[cit. Alla Bolag, <https://www.allabolag.se/5565360202/hemnet-sverige-ab>, (2018)].

¹⁹⁶ KKV, *Konkurrens och tillväxt på digitala marknader*, (2017), at 143.

¹⁹⁷ The three-tier notification system in Sweden refers to i) the turnover-based thresholds ii) the KKV option to oblige a concentration to be notified iii) the parties' option to voluntarily notify the concentration. See to this effect SFS 2008:579 *Konkurrenslag*, 4 kap. 6-7 §§.

¹⁹⁸ Ring-fencing is a process through which, through the contract at hand, parties may exclude its application to certain jurisdictions. Such practice may be common where the concentration would not have an effect in a certain jurisdiction but there is a general mandatory notification scheme.

¹⁹⁹ ICN Merger Working Group Notification & Procedures Subgroup, 'Setting Notification Thresholds for Merger Review' [April 2008]. Available at <

<http://www.internationalcompetitionnetwork.org/uploads/library/doc326.pdf>>

accessed 5 April 2018. [cit. ICN Merger Working Group (2008)], at 3.

²⁰⁰ ICN Merger Working Group (2008), at 3; KKV, *Konkurrens och tillväxt på digitala marknader*, (2017), at 145.

and potential reform. Furthermore, the overall discussion highlights the procedural and, partly, substantive alignment between national and EU merger control. It also stresses the need for further collaborative action when regarding potentially harmful M&A transactions that may be detrimental on various market levels.²⁰¹

4.4.3 Problematic Aspects

One may argue that spontaneous harmonisation has been highly successful. However, for the purpose of this thesis one must assess spontaneous harmonisation and the general need for national reform within a new-economy framework. Regardless of which one of these aspects is assessed, both should likely be noted as slow processes. This may be vital as new-economy M&A transactions will continue to fall outside merger control until reform is implemented, which may lead to detrimental and irrevocable harm on the relevant market. Furthermore, an awareness as regards issues within the new-economy sector combined with non-implementation may cause various issues. One is changes within the practices of NCAs, such as seen through KKV recently paying more regard to concentrations that fall towards the lower end of the thresholds²⁰². Where such practice is established due to regulatory gaps it may be considered problematic as praxis should not replace adequate legislation.

Issues regarding forum-shopping, as seen in previous sections, also continue. Where thresholds are dissimilar across Member States, forum-shopping may occur through the parties excluding application of the transaction agreement in specific jurisdictions. This may create divisions based on national jurisdictions across the internal market²⁰³. As such, forum-shopping increases the chance of curtailing protection against anti-

²⁰¹ KKV, *Konkurrens och tillväxt på digitala marknader*, (2017), at 142-144.

²⁰² KKV, 'Särskilda undersökningar av företagskoncentrationer fr.o.m. 1993-07-01' (*Konkurrensverket*, November 2017)

<<http://www.konkurrensverket.se/globalassets/konkurrens/sarskilda-undersokningar-foretagskoncentrationer.pdf>> accessed 25 March 2018. [cit. KKV, <http://www.konkurrensverket.se/globalassets/konkurrens/sarskilda-undersokningar-foretagskoncentrationer.pdf>, (2017)].

²⁰³ Burnley (2002), at 266.

competitive effects. However, one could argue that if there is no material difference between Member States' merger control thresholds, forum-shopping is in fact increased as more jurisdictions could be ring-fenced with the same action. As such, spontaneous harmonisation, whereby the threshold-model chosen is similar to capture new-economy transactions, but the threshold-levels are dissimilar between jurisdictions to reflect local nexus, industry and past M&A activity²⁰⁴, could thus allow for a lesser risk of forum-shopping. In this fashion, the internal market benefits from a degree of diversity in the levels of the thresholds. This casts a wider net for new-economy transactions to be captured and dealt with under national procedure or referred to the Commission through Article 22, EUMR.

The most fundamental issue that must be considered is however that of the legal principles of subsidiarity and sovereignty²⁰⁵. This is especially so due to the politically sensitive nature of jurisdiction in merger control and the potential opposition by Member States to see an increase of Commission jurisdiction²⁰⁶. Again, it is established that there are issues regarding the fine-tuning of the division of competence between the EU and Member States to ensure that the Commission solely assesses concentrations with gross implications on the internal market²⁰⁷. However, it is equally important that national merger control systems and NCAs are capable to effectively act and capture new-economy transactions, where they fall outside the scope of Commission jurisdiction, to ensure an efficient protection of the internal market. Historically, the opposition of Commission jurisdiction by France, the UK and Germany suggests that a decentralised solution is preferable²⁰⁸. However, this is effectively what spontaneous harmonisation allows for, albeit using the EU system as a model, simultaneously it bypasses an increased jurisdiction on either level. This decentralised solution is

²⁰⁴ OECD, 'Executive Summary of the Roundtable on Jurisdictional Nexus in Merger Control Regimes' [November 2016]. Available at <
[https://one.oecd.org/document/DAF/COMP/WP3/M\(2016\)1/ANN3/FINAL/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/M(2016)1/ANN3/FINAL/en/pdf)>
accessed 31 January 2018. [cit. OECD, Executive Summary of the Roundtable on Jurisdictional Nexus, (2016)], at 3.

²⁰⁵ Levy and Cook (2016), at chapter 6, page 5.

²⁰⁶ Burnley (2002), at 266.

²⁰⁷ Levy and Cook (2016), at chapter 6, page 4.

²⁰⁸ Bishop and Kay (1993), at 205; Kassamali (1996), at 18.

incremental and it must not be to the detriment of the internal market and a functioning competitive market²⁰⁹. On a similar note, spontaneous harmonisation may give rise to a situation where the protection against new-economy transactions is initially regulated by a handful of Member States where EUMR thresholds are not met. This may result in certain sensitivities as NCAs would, arguably, assess concentrations from a national standpoint. One such factor would be the potential for political influence and national champions²¹⁰. Another factor to consider is that of negative externalities and spill-over effects²¹¹, whereby decisions issued by NCAs have the potential to impact jurisdictions other than its own in both a negative and a positive manner²¹². However, when dealing with international companies the spill-over effects may be similar across jurisdictions, and such spill-overs would not be to a greater extent than already present.

4.5 Chapter Conclusion

This chapter aimed to highlight that the need for reform and protection against new-economy concentrations is not limited to the EUMR but exists within individual Member States' merger control systems as well. Whilst harm from the new-economy sector may be potential, it will be detrimental where it actually occurs because of the nature of the new-economy. Particularly, the maintenance of the internal market may require reform in national systems. Member States must be capable of capturing such concentrations within their own legal orders and ensure that the full scope of transactions are vetted.

Whilst arguments regarding harmonisation may be brought forth, and harmonisation has the potential of being successful, it is also politically unlikely. However, through the process of spontaneous harmonisation one may see legislative reform and changes in praxis. This may arise through the influence of other leading jurisdictions such as Austria and Germany, but

²⁰⁹ Neven and Nuttal and Seabright (1993), at 177.

²¹⁰ M Nnadi, and O Okene, 'Merger Regulations and Ethics in the European Union: The Legal and Political Dimensions' [2012] 33(3) European Competition Law Review. [cit. Nnadi and Okene (2012)], at 128.

²¹¹ Neven and Nuttal and Seabright (1993), at 180.

²¹² Mateus (2010), at 520.

foremost through the Commission inquiry, potential EU reform arising from the inquiry and Commission practice. One may however question if these will be sufficient catalysts to spark spontaneous harmonisation. As evidenced by Sweden, the NCA awaits the outcome of the Commission public consultation; if no legislative proposal is made it will remain to be seen if individual Member State action will be taken. However, the influence of *Apple/Shazam*²¹³ and its capture by the Austrian NCA through the recent amendments to its national merger control should not be underestimated. Sweden, and KKV, also demonstrates that legislative reform tends to follow reform on an EU level both as to substance and procedure. Furthermore, one notes that new-economy concentrations may occur on a singular national jurisdiction, which all the more highlights the need for ensuring that national notification thresholds are capable of capturing new-economy concentrations.

However, there are certain problematic aspects that must be considered. These include ensuring that it is not merely a handful of Member States that implement such reforms, which also helps increase the efficiency of Article 22 EUMR referrals where necessary. Convergence does not need to equate to the exact same levels however, as a degree of diversity in thresholds may result in a decreased chance of forum-shopping. Spontaneous harmonisation also has the benefit of avoiding a competence-creep on a centralised level, and as such bypasses otherwise sensitive questions regarding sovereignty, subsidiarity and jurisdictional divides. Spontaneous harmonisation may therefore be considered a real and substantial process for creating safeguards against the realisation of anti-competitive harm through new-economy concentrations. It must, however, also be understood that the incremental nature of spontaneous harmonisation carries the risk of harm affecting the internal market before national safeguards may be put in place.

²¹³ *Apple/Shazam* (2018).

5 Alternative Threshold Models

In light of the need for implementing thresholds capable of capturing new-economy transactions on a national level, this chapter aims to highlight and examine notification thresholds built on market shares and voluntary notification. These models have been selected for analysis based on literature, academic scholarship, and the pre-existing use of these models in national systems. The models have also been chosen as they represent possible alternatives and complements to thresholds based on turnover and/or the value of the transaction. Whilst their employment on an EU level is not excluded, the focus is on their potential use on a Member State level. This reflects the need for reform on a national level, as found in previous chapters, to ensure that national merger control systems capture new-economy transactions to merit reliance on EUMR referral mechanisms, and effectively minimise the current regulatory gap in the EUMR. Discussion of alternative models also permits an assessment of the exact extent of reform that is needed or if it may be considered too drastic. Each system is examined from the perspective of their ability to capture harmful new-economy transactions. Throughout, policy considerations of an economic nature are considered. Lastly, problematic aspects are developed such as the divergence between these models and the EUMR model in light of spontaneous harmonisation and the likely success of these models in comparison with thresholds relating to the value of the transaction.

5.1 Necessary Characteristics of a Notification System

To be able to evaluate a potential model for merger control notifications, one may look to international best practice and recommendations for initial guidance. As two of the leading organisations on competition and merger control, one may look to the ICN and OECD for instruction. In 2005, the OECD issued such guidance where they stated that a system for merger review should uphold principles such as effectiveness, efficiency, procedural

fairness, the rule of law, transparency as regards policies and rules, and limit costs and burdens on all relevant parties²¹⁴. Thus, notification thresholds must be clear and provide a precise test²¹⁵ containing a measurement tool, a clear geographic area and use a temporal delimitation²¹⁶. Pre-merger criteria and approval is the favoured mode, consequently creating a boundary between mergers requiring approval and those companies free to conduct M&A activity without prior approval²¹⁷.

Best practices state that national systems must ensure that notification thresholds establish a local nexus between the concentration and the jurisdiction²¹⁸, usually through looking at the local activity of the parties or target company²¹⁹. This relates to ensuring that authorities do not over-reach, leading to additional burdens in the form of costs, time and unnecessary regulatory hurdles for the concerned parties²²⁰. However, there is no exact guidance as regards the specific local nexus that is required or desirable²²¹.

This may be a particular concern for smaller economies as thresholds generally refer to both domestic and international turnover. In smaller economies domestic companies may struggle to reach such levels due to industry players being smaller as well²²². However, best practice does refer to the need to consider "GDP, the dimension of local companies, the structure

²¹⁴ OECD, 'Recommendations & Best Practices: Recommendation of the Council on Merger Review' [2005]. Available at <http://www.oecd.org/competition/mergers/40537528.pdf> accessed 31 January 2018. [cit. OECD, Recommendations & Best Practices, (2005)], at 2.

²¹⁵ ICN Merger Working Group (2008), at 3.

²¹⁶ ICN, 'Recommended Practices for Merger Notification and Review Procedures' [2017]. Available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc1108.pdf> accessed 30 January 2018. [cit. ICN (2017)], at 5-6.

²¹⁷ P Buccirossi, and R Cervone, and C Riviera, 'Optimal Pre-Merger Notification Thresholds: A Contribution to the Italian Debate' [2014] 3 Italian Antitrust Review. [cit. Buccirossi and Cervone and Riviera (2014)], at 166.

²¹⁸ ICN (2017), at 4.

²¹⁹ OECD, Executive Summary of the Roundtable on Jurisdictional Nexus, (2016), at 3.

²²⁰ OECD, 'Summary of Discussion of the Roundtable on Jurisdictional Nexus in Merger Control Regimes: Annex to the Summary Record of the 123rd Meeting of the OECD Working Party No. 3 on Co-operation and Enforcement on 14-15 June 2016' [Nov 2016]. Available at <

[https://one.oecd.org/document/DAF/COMP/WP3/M\(2016\)1/ANN2/FINAL/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/M(2016)1/ANN2/FINAL/en/pdf) accessed 31 January 2018. [cit. OECD, Summary of Discussion of the Roundtable on Jurisdictional Nexus, (2016)], at 4.

²²¹ ICN Merger Working Group (2008), at 2.

²²² ICN Merger Working Group (2008), at 8.

of their economy, the experience of similarly situated jurisdiction, previous merger control experience, and [the ability] to conduct international comparisons"²²³. This clearly demonstrates the variety of considerations that national notification systems must adapt and adjust to, indicating that the necessary degrees of diversity discussed in the previous chapter would not only be necessary to decrease forum-shopping but also to ensure the system's functionality.

A local nexus also ensures that the transaction has an appreciable impact on the economy, market and jurisdiction²²⁴. However, one could argue that such impact should not merely be a jurisdictional measure but should aim towards appreciating the competitive effects a transaction may have in a given jurisdiction²²⁵, consequently decreasing financial burden on the agency and decreasing a wasteful use of resources²²⁶. Once again, one may note that the interlink between materiality and nexus is not adequately examined in international recommendations²²⁷. However, it may be guiding that on an EU level the jurisdictional thresholds are not aimed at assessing the concentration²²⁸, as might be done through thresholds referring to dominance for example. Objective criteria is favoured as a measurement tool due to its objectivity and quantifiable nature, however it is also recognised that such measurements are generally inefficient at solely targeting transactions with an anti-competitive effects²²⁹.

Were thresholds able to imply an appreciable anti-competitive effect, one would further be able to decrease the risk of potentially anti-competitive mergers not being notified and not being subject to merger control, thus lessening potential negative effects on consumer welfare and the market²³⁰. On this note, thresholds should generally operate to reduce two types of errors. Firstly, thresholds should lessen 'cost-related-errors', relating to thresholds causing over-enforcement or being overly inclusive. This occurs

²²³ OECD, Executive Summary of the Roundtable on Jurisdictional Nexus, (2016), at 3.

²²⁴ ICN Merger Working Group (2008), at 3.

²²⁵ ICN Merger Working Group (2008), at 4; ICN (2017), at 3.

²²⁶ n238, ICN Merger Working Group Notification & Procedures Subgroup (2008), at 4.

²²⁷ OECD, Executive Summary of the Roundtable on Jurisdictional Nexus, (2016), at 4.

²²⁸ Commission Jurisdictional Notice (2008), at para 127.

²²⁹ ICN Merger Working Group (2008), at 4.

²³⁰ ICN Merger Working Group (2008), at 4.

where resources may be considered wasted through parties spending much time and monies into investigating if a transaction is notifiable, potentially due to the thresholds being excessively complex, or through NCAs spending resources on investigating a notification of a concentration that causes no anti-competitive harm. Secondly, thresholds should minimise ‘harm-related-errors’, which regard thresholds permitting under-enforcement. Such an error may be found where anti-competitive transactions avoid, or are excluded from, notification. This type of error thus permits anti-competitive harm to reach the market because had the thresholds brought the concentration within the legislation, and subsequent review, the concentration could have been opposed or prohibited.

However, this role must be contrasted with the fact that potential national reform would necessarily increase the burden on NCAs or regulatory bodies due to the need for issuing further guidance and similarly, it would likely have the same impact on industries as they would have to adapt to new thresholds²³¹. However, burdens associated with initial reform measures would be short-term and would, arguably, produce long-term efficiencies through strengthening safeguards and the merger control system. Furthermore, it should be highlighted that implementing thresholds does not necessarily result in repealing the previous thresholds as reform could take the form of amendments. Simultaneously, one could assume that prohibition decisions would remain the exception rather than the general rule.

5.2 Market Shares

A notification system built on market share thresholds is one alternative model found in various sources. Such a system could for example establish a duty to notify based on the combined market shares expected to be reached through the concentration, the market shares of the individual parties to the concentration, or a combination of both. This may arguably satisfy more formalistic criteria constituting a bright-line test, however there are also areas where thresholds based on market shares may be highly problematic.

²³¹ Davilla (2017), at 378.

Market share thresholds could cause issues pertaining to definitions that may bear great legal consequences. This relates to the fact that to determine market shares one must determine a series of other matters beforehand, such as the relevant market in terms of products, activity and geography²³². As such, market shares are not quantifiable in the same sense as turnover for example and may be considered subjective²³³. Even a slight change in the definition of market could result in vastly different results, thus decreasing predictability and legal certainty where there are differences in opinion on the correct definition of the relevant market²³⁴. This may also relate to market shares depending upon information that is unavailable to the parties²³⁵, such as market shares of competitors²³⁶. One may consequently argue that thresholds based on market shares may result in ill-informed choices having widespread consequences as regards potential intervention by the NCA, or argue that it may invite forum-shopping. Where inadequacies arise due to a lack of information, and mergers may be consummated in good faith upon the parties' self-assessment, this highlights issues as regards legitimate expectations and legal certainty. It should also be added that the process could result in merger approval taking longer time due to the need to establish accurate market shares²³⁷ as well as being more costly if external counsel, such as financial advisors, are needed²³⁸.

On the other hand, it should also be appreciated that, on an EU level, one version of this already exists through block exemptions under Article 101 TFEU²³⁹. However, one must bear in mind that the consequences of a flawed application of block exemptions under Article 101 and a flawed application of market share thresholds in an M&A setting are very different. A failure to notify a concentration, even in good faith, may result in the imposition of high

²³² Buccirossi and Cervone and Riviera (2014), at 167.

²³³ ICN (2017), at 6.

²³⁴ Broberg (2014), at 265.

²³⁵ Burnley (2002), at 271.

²³⁶ Buccirossi and Cervone and Riviera (2014), at 167.

²³⁷ Commission, Annex I to Green Paper, (2001), at 66.

²³⁸ P Callol, 'A Practical Guide on How to Deal with Market Share Notification Thresholds: Risks and Solutions in Multijurisdictional Transactions' [2012] 33(11) European Competition Law Review. [cit. Callol (2012)], at 513.

²³⁹ Boutin and Boutin (2017), at paras 82-83.

financial penalties²⁴⁰. In parallel, where a merger that escapes review would have been opposed to, anti-competitive harm may occur on the market²⁴¹. These consequences, which may follow from a merger scenario, are both harsher and more permanent in nature, thus one should be critical of an analogy between notification thresholds based on market shares and those used in the block exemptions under Article 101 TFEU. Simultaneously, on an EU level there are already demands upon parties to define and provide information on the relevant geographic and product market in the Form CO, thus arguments regarding cost and uncertainty should be limited as larger enterprises with previous M&A history, and counsel, already have some experience with this system. However, one may question how this would be implemented on a Member State level where medium- or small-sized companies may be unfamiliar with market shares. Furthermore, one may argue that market shares, particularly as they have been dismissed as an adequate basis for jurisdictional thresholds in the EUMR²⁴², are unlikely to be implemented on a national level considering the procedural uncertainty they pose as well as their divergence from EU law in light of spontaneous harmonisation²⁴³.

Whilst the definition of the market may cause issues, it also provides the opportunity to create a strong local nexus as one may limit it to the national market in question as well as adapt the market shares to the national economy. However, further issues arise as regards the potential for market shares to indicate some potential anti-competitive damage. This is particularly so as market shares does not necessarily equate to evidence of power²⁴⁴, nonetheless they could be considered closer to indicating market power than turnover for example²⁴⁵. Within a new-economy context though, this may not be an absolute truth. As the new-economy generally regards fast-moving

²⁴⁰ Case T-332/09 *Electrabel v European Commission* [2012] ECLI:EU:T:2012:672. [cit. *Electrabel v European Commission* (2012)].

²⁴¹ Boutin and Boutin (2017), at paras 78-79.

²⁴² Commission, Annex I to Green Paper, (2001), at 65.

²⁴³ Kassamali (1996), at 18.

²⁴⁴ V Roman, 'Digital Markets and Pricing Algorithms – a Dynamic Approach towards Horizontal Competition' [2018] 39(1) *European Competition Law Review*. [cit. Roman (2018)], at 39.

²⁴⁵ Broberg (2014), at 265; Callol (2012), at 512-513.

markets reliant on innovation, market shares may not be determinative of lasting market power²⁴⁶. Scholarship suggests that for market share thresholds to be successful, the system would need to account for drastic innovation and dynamic competition²⁴⁷ - on the other hand, one may argue that this is an disproportionate additional role of national notification thresholds. However, it may be more likely to capture instances of strategic acquisitions within the sector. One should, nonetheless, be highly critical in light of the substantial regulatory and financial burdens on NCAs and parties to the transaction, potential issues of legal certainty, predictability and efficiency.

5.3 Voluntary Review

Systems based on voluntary review may suffer from similar issues. However, voluntary notification may have varying frameworks and thus different up- and downsides. The ICN recognises that this type of system may act as a good indicator of potential competitive concern, but recommends clear guidance as to if notification should be made²⁴⁸. Such guidance could provide for meeting the criteria laid out in international recommendations and best practices, however, it also highlights the immediate need to bolster the system with legal certainty and predictability.

One example of a jurisdiction making use of a voluntary system is the UK. This notwithstanding, the Competition and Markets Authority (henceforth ‘CMA’) has the right to open its own investigation. This is dependent on the existence of a relevant merger situation, which means that jurisdictional thresholds relying on turnover and share of supply are exceeded²⁴⁹. As such, a form of residual jurisdiction arises. Relying on the definition of a relevant merger situation, as well as combinations of thresholds, result in a situation where notification by the parties is voluntary but in fact, the CMA's continued right to review creates an implied duty²⁵⁰.

²⁴⁶ Evans and Schmalensee (2001), at 16-19.

²⁴⁷ Evans and Schmalensee (2001), at 20.

²⁴⁸ ICN (2017), at 6.

²⁴⁹ Enterprise Act [2002]. [cit. Enterprise Act (2002)], at part 3, chapter 1, section 22-23.

²⁵⁰ Pouncey and Fountoukakos and Rowland and Puech-Baron and Katrana and Maly, <https://globalcompetitionreview.com/insight/the-european-middle-eastern-and-african-antitrust-review-2018/1145620/european-union-merger-control>, (2018).

Simultaneously, this requires that the CMA is aware, or is made aware, of the merger. Deterrence may be established through the CMA's power to break up firms despite the lack of any breach of competition law in order to remedy market failures and anti-competitive harm²⁵¹. One should however be critical of such an approach due to its lack of legal certainty²⁵², whilst wary that its application is of an exceptional nature. The system established by the Enterprise Act [2002] allows for a potential in decreased cost through avoiding unnecessary notifications, thus minimising cost-related-errors. Simultaneously, it does increase the possibility for harm-related-errors, as the CMA's residual jurisdiction may increase the risk of costly litigation where the CMA can oppose a concentration that has not been notified. Furthermore, the decrease of cost-related-errors may be debated as parties to a concentration may choose to notify due to a lack of predictability and certainty²⁵³. This problematic aspect must be highlighted due to its specific recognition by the ICN²⁵⁴.

The OECD recently recommended that an option would be that residual jurisdiction targets concentrations that have "substantial, direct and foreseeable effect on competition on the local market"²⁵⁵ along with practical guidance and the opportunity for contact with the NCA. Such a model would be more likely to satisfy the question of local nexus and the thresholds themselves could be adapted to national economy and industry.

To examine another Member State currently using a version of a voluntary model, with residual NCA jurisdiction, one may again refer to Sweden²⁵⁶. Turnover-based thresholds are in place, however KKV may also demand a party to the transaction to notify a concentration where there are

²⁵¹ Enterprise Act (2002), at part 4.

²⁵² S Thomas, 'De-Merger Regimes in Europe. Are National Deconcentration Powers an Appropriate Tool for Enhancing Competition in the EU?' [2011] 2(3) *Journal of European Competition Law & Practice*. [cit. Thomas (2011)], at 212.

²⁵³ C Choe, and C Shekhar, 'Compulsory or Voluntary Pre-Merger Notification? Theory and Some Evidence' 28 [2010] *International Journal of Industrial Organization*. [cit. Choe and Shekhar (2010)], at 11.

²⁵⁴ ICN Merger Working Group (2008), at 12.

²⁵⁵ OECD, *Summary of Discussion of the Roundtable on Jurisdictional Nexus*, (2016), at 9.

²⁵⁶ Prop. 1998/99:144. [cit. Prop. 1998/99:144], at page 9; confirmed in *Näringsutskottets betänkande 1999/2000:NU8*. [cit. *Näringsutskottets betänkande 1999/2000:NU8*].

special causes as long as the 1 billion SEK threshold is satisfied²⁵⁷. Guidance issued by KKV gives examples as to when special causes may arise, such as a strong market player acquiring a start-up that may be a potential competitor. Notably, the guidance also dictates that complaints from competitors and consumers could be ground for obliging a party to notify²⁵⁸. Furthermore, one may notify the concentration voluntarily even where the lower threshold of 200 million SEK is not satisfied²⁵⁹. Where parties "have high market shares or will get high market shares as a result of the concentration, or (know) that the concentration may attract relevant critique from customers or competitors"²⁶⁰, they are thus able to transcend issues regarding thresholds and avoid a KKV decision obliging them to notify *ex post*. It is also important to highlight that the option for a voluntary notification by the parties allow certainty and predictability for the parties, as they are able to gain regulatory approval, or non-opposition, of the transaction.

The Swedish model consequently aligns with ICN's view of a voluntary model, along with residual jurisdiction, as they consider that it allows thresholds to be more flexible²⁶¹. Having a less rigid version of thresholds, along with guidance also to the possible cases where NCA action or voluntary notification should be made, arguably diminishes arguments regarding lack of legal certainty and predictability. As the Swedish system is a three-tier system, where the residual jurisdiction and voluntary notification are tertiary to the ordinary mandatory notification, one could argue that harm-related-errors are also decreased.

This may particularly be the case as regards new-economy concentrations. In both versions of the voluntary models explored here one notes that the risk of *ex post* intervention merits a voluntary notification. At the same time, it does not endanger the typical concentrations as other thresholds are used in conjunction with the voluntary ones; rather, the system could be seen as a method to target transactions that risk falling outside

²⁵⁷ KKV, Vägledning för anmälan och prövning av företagskoncentrationer Dnr 617/2017 (January 2018). [cit. KKV, Vägledning för anmälan, (2018)], at 23.

²⁵⁸ KKV, Vägledning för anmälan, (2018), at 23-24.

²⁵⁹ KKV, Vägledning för anmälan, (2018), at 27.

²⁶⁰ KKV, Vägledning för anmälan, (2018), at 27.

²⁶¹ ICN Merger Working Group (2008), at 6.

merger control. Whilst one can argue that dual systems can give rise to a complex merger control system, one may also argue that it creates flexibility. The NCA may ensure the protection of the market, and the parties receive the opportunity to gain approval of a given transaction. Such arguments presuppose that companies are in want of merger approval and that forum-shopping does not occur; the existence of residual jurisdiction may thus be warranted and act as a deterrent against non-notification.

This may be highly influential within the new-economy when dealing with strategic acquisitions. Strategic acquisitions, with the intention of foreclosing potential future competitors, may arguably merit stricter regulatory intervention than other types of transactions. This is something that a voluntary model with a residual NCA jurisdiction could allow for as NCAs could opt to direct more focus to this type of acquisition, seen through the guidelines issued by KKV explicitly mentioning this type of foreclosure technique²⁶². However, one must question if thresholds should target strategic acquisitions only or if there is a need for regulating new-economy concentrations more generally. Only targeting larger market players means that medium and small cap transactions continue to fall outside merger control and as such continue to shape markets without a competition law assessment. These are policy and practical considerations that must be borne in mind by regulatory bodies and demonstrate the balancing act that is required by national authorities when considering possible national reform.

5.4 Critical Analysis of Alternative Models

Something that must be borne in mind with regard to both systems evaluated in this chapter is that of cost. There are advantages as regards cost-related-errors, as a wasteful use of resources could be avoided by both NCAs and parties to the notification. However, where merger control systems differ too much across the EU one must consider the financial and temporal burdens imposed on the parties to a transaction, as well as the potential lessening of predictability²⁶³. Whilst a degree of divergence across systems is favourable

²⁶² KKV, Vägledning för anmälan, (2018), at 23.

²⁶³ Burnley (2002), at 265-266.

to ensure that transactions of various sizes are caught by national jurisdictions, it may in fact act as a deterrent where multiple notifications are required and the divergence is too great²⁶⁴. Consequently, one must weigh such costs and policy considerations against the potential harm caused harm-related-errors as regards new-economy concentrations. Spontaneous harmonisation may safeguard against such divergence, however, its role may be diminished if an EU reform does not occur and there is also a widespread difference in systems used on a national level. However, spontaneous harmonisation may also act to ensure that such divergence does not occur in the first place among Member States; therefore, the given examples of systems in the UK and Sweden may be highly relevant.

Consequently, the alternative models may still be used in reform. It thus becomes vital to understand and explore the systems based on their potential efficiency in capturing new-economy concentrations. Looking to a notification system built on market shares, one notes that the system has received much criticism regarding definitions and subjectivity. However, market share thresholds as a basis for notification would arguably be telling of the potential impact of a concentration on the market. Such thresholds also allow for creating ample local nexus, yet may be uncertain due to dependency on the definition of the relevant market. As regards market shares, they may be efficient to a degree, however, issues may arise when dealing with strategic acquisitions regarding start-ups, or where products have not yet been launched, as market shares within these companies may still be low unless specifically addressed by the thresholds. In such circumstances, the model's efficiency in capturing transactions would depend on whether market shares focus on the target company, which is usually more established on the market, or the acquiring company, which may be a start-up that has not yet gained segments of the market. Where market shares target the acquiring company, are set at levels that considers the structure of the market, and potentially consider IP ownership; it is a strong medium for capturing new-economy concentrations. However, one notes that these criteria may be difficult to

²⁶⁴ Broberg (2014), at 265.

satisfy, an issue that is additional to the issues regarding subjectivity, certainty and definitions. Combined, this arguably makes thresholds solely relying on market shares unsuitable as a determinant for creating a duty to notify a transaction. Such issues are heightened when viewed with the argument that such thresholds may diverge much more from current practice than would the addition of residual NCA jurisdiction for example.

As regards a voluntary model one may note that the voluntary nature and residual NCA jurisdiction would be the model's strongest tools. It may be considered tactical, yet legal principles and international recommendations result in a more predictable approach. The CMA capturing *Facebook/Instagram*²⁶⁵ and KKV capturing *Blocket/Hemnet*²⁶⁶ indicate a potential for success as regards online platforms on both an international and national level; however, there seems to be a lack of captured transactions within the bio-technology and pharmaceutical sectors of the new-economy.

The voluntary nature of the model may seemingly invite forum-shopping, resulting in the need for clear and effective enforcement as regards residual jurisdiction to ensure that it has a sufficiently deterrent effect. Making an analogy to an EU level, one may note that when assessing new-economy transactions above, there was a tendency for parties to ask for referral to the Commission from NCAs. This could be considered as giving the voluntary model more credibility as companies seemingly seek legal certainty and predictability. However, there are also arguments that the same might not occur at the first point of notification and that seeking a referral to the Commission was due to cost of notifying in several jurisdictions. This might be exemplified through *Apple/Shazam*²⁶⁷ not being notified in any voluntary jurisdiction, nor were the parties requested to notify in a voluntary jurisdiction despite the option being available to NCAs, which is a criticism one should not ignore. Simultaneously, the voluntary nature also allows parties seeking predictability, and the certainty of a regulatory approval, to notify when necessary.

²⁶⁵ Anticipated Acquisition by Facebook Inc of Instagram Inc, Office of Fair Trading (now CMA) decision ME/5525/12 of 14 August 2012. [cit. Facebook/Instagram (2012)].

²⁶⁶ Blocket/Hemnet (2016).

²⁶⁷ Apple/Shazam (2018).

For the residual jurisdiction to function as a deterrent against forum-shopping and avoiding notification there must also be a function to ensure widespread knowledge of transactions by the NCA. The nature of the new-economy may diminish such knowledge especially where the transaction is not between well-established market players. Here, the Swedish system of accepting complaints from consumers and competitors may increase such knowledge and allow the NCA to decide if action is warranted. Consequently, one notes that a voluntary model may be efficient, yet not flawless. Efficiency as regards the new-economy will depend upon the existence of an operative application of residual jurisdiction and mechanism for the NCA to be aware of transactions on the market.

5.5 Chapter Conclusion

A national notification system will need to take into account, and target, new-economy concentrations as well as comply with best practices. These include notification thresholds that are effective, efficient, transparent, clear, respect the rule of law, establishes a local nexus, are adaptable to the national economy, limit cost-related-errors and harm-related-errors, demonstrate an impact on the jurisdiction as well as limit costs on parties and the NCA.

The chapter has explored alternatives to turnover and size-of-transaction models. In both systems there are advantages and disadvantages. Similar conclusions were reached when considering thresholds based on the size-of-the-transaction model. What is noticeable is that thresholds relying on market shares suffer much criticism in regards to not satisfying legal principles. Particular critique is given due to issues regarding definitions and subjectivity, however, arguments regarding subjectivity should be read critically considering the inherently subjective nature of the size-of-transaction model. Notification thresholds relying on market shares may be the well suited to demonstrate potential anti-competitive issues. However, the model has substantial flaws through its uncertain and complex nature. With this background, it is argued that its implementation cannot be justified.

An evaluation of the voluntary model demonstrates that there are less issues with procedural criteria than the market shares system had; there are

also Member States that currently have versions of this model which demonstrate a degree of acceptance and operability. However, clear guidance is required by NCAs as regards when notification may be recommended. Guidance may refer to other thresholds, which increase predictability and legal certainty. The most acute flaw with the voluntary model is the potential for transactions to not be notified, however where NCAs have residual jurisdiction that is clear and effective such harm-related-errors may be avoided. One could argue that the existence of residual jurisdiction is the most fundamental element as it grants NCAs the power to intervene where potentially anti-competitive concentrations occur. However, one must also be wary that residual jurisdiction is applied as an exception, rather than the rule, to avoid situations of *ex post* intervention leading to transactions being void *ab initio*. Ultimately, voluntary notification models may be efficient in capturing new-economy concentrations, however it is most likely able to do so based on undertakings' want for approval, or perhaps a want to avoid post-concentration NCA action. However, where this version of a voluntary model is employed effectively, it would likely be the optimal additional model for capturing new-economy transactions within merger control legislation.

Furthermore, one should not regard this alternative as removing pre-existing systems overall. Rather, it may act as a complement to current merger control systems²⁶⁸ that especially aims at targeting the new-economy sector and creates flexibility to determining other thresholds²⁶⁹. Hence, one may argue that it does not endanger merger control as it stands but rather broadens its grasp and creates further safeguards. What should be argued is that Member States, in light of potential harm on the internal market by transactions within the new-economy, must and should implement safeguards in the form of thresholds capable of capturing these transactions. What model is ultimately chosen will likely depend upon the evolution of spontaneous harmonisation, national industrial and financial considerations, and the examples of Member States that use different models such as Germany, Austria, Sweden and, depending on the outcome of Brexit, the UK.

²⁶⁸ Sauermann (2017), at 431.

²⁶⁹ OECD, Executive Summary of the Roundtable on Jurisdictional Nexus, (2016), at 3.

6 Conclusion

Through exploring the concept of the new-economy in chapter 2, within the framework of Commission jurisdiction, one notes that there is a regulatory gap within the EUMR that leads to new-economy transactions systematically failing to come within its scope and be subject to effective merger control. Chapter 2 of this thesis found the new-economy sector to consist of fast-moving markets, including online platforms, the pharmaceutical industry and biotechnology companies, with a focus on drastic innovation and IP ownership. Fundamentally, companies within the new-economy were found to potentially lack sufficient turnover because they offer online-services for free, have not yet launched products, or because start-ups have not yet fully entered the market. However, this does not inhibit their potential to quickly grow and being strong competitors to other companies on the market. These kinds of entities may thus be attractive M&A targets for more established companies within the sector as the transaction could allow for an integration of technology or acquisition of IP or R&D.

Fundamentally, it may also allow for strategic acquisitions, whereby the acquirer is able to purchase potential future competitors and hinder a future relationship as direct competitors, thus decreasing long-term competition and innovation on the market. Putting these findings within the framework of the Article 1 EUMR thresholds, one finds that the thresholds rely on parties' turnover as a proxy for the concentration's competitive impact; this may be misleading within the new-economy sector. Because the thresholds rely on turnover, and because new-economy companies may lack sufficient turnover, a regulatory gap appears within the EUMR in regards to new-economy concentrations.

Moreover, an examination of previous new-economy concentrations demonstrates that the EUMR is currently relying on referral mechanisms to establish Commission jurisdiction over the concentrations. In particular, there is a prevalence for Article 4(5) EUMR, whereby parties to a transaction may apply for Commission jurisdiction where the concentration is capable of

being reviewed in a minimum of three Member States. This likely reflect parties' wishes to utilise the one-stop-shop principle in the EUMR, decrease cost and time, and gain the predictability associated with a single regulatory approval. However, the concentration of *Apple/Shazam* demonstrates that this may not always be the case, or that Article 4(5) EUMR may not always be satisfied, thus leading to the exclusion of a possible notification to the Commission and potential avoidance of Commission scrutiny. This relates to the fact that *Apple/Shazam* was only captured by one Member State, which consequently referred the concentration to the Commission through an Article 22 EUMR referral. This highlights the regulatory gap to a different extent, as it demonstrates the actuality of the gap and the possible inefficiency of EUMR referral mechanisms. There is thus a need for reform on an EU level to safeguard the market against anti-competitive harm arising out of new-economy transactions.

To investigate the perceived regulatory gap, the Commission recently launched a public consultation on the need for implementing additional thresholds into the EUMR that are based on the value of the transaction. This consultation and model was examined in chapter 3 of the thesis. The majority of respondents to the consultation did not consider that there was a need for reform. These respondents suggested that Member States could adequately deal with new-economy concentrations by utilising the referral system under Article 22 EUMR where necessary. However, this response should be read critically, especially as it assumes that national notification systems does not have a similar regulatory gap and in fact do capture new-economy concentrations.

Looking at the size-of-transaction-based model, the thresholds would effectively use price as a proxy for a transaction's competitive worth. This may be critiqued as issues exist regarding the accurate method for quantification, the nature of price as being negotiable and part of a complex process involving considering several factors such as those that may emerge during a due-diligence of the target company. Furthermore, this may place a heavy burden on the parties to a transaction and require changes as to how a transaction is structured. However, the most fundamental problem occurs

because of potential forum-shopping due to the subjective nature of price. Consequently, it is argued that size-of-transaction-based thresholds are not optimal, and may fail in closing the existing regulatory gap in the EUMR to a satisfactory degree. The amendment may mitigate, but will not eliminate, the problem.

In light of the EUMR's reliance on referral mechanisms in regards to new-economy transactions and the majority response to the public consultation, it must be examined if sole EU reform will be sufficient to safeguard against new-economy concentrations that cause anti-competitive effects. This becomes particularly important because of the division of jurisdiction between Member States and the Commission within merger control. Firstly, where there are reforms to the EUMR, but Member States' merger control systems do not capture new-economy transactions, only the largest transactions with cross-border impacts would be regulated. Secondly, if there is a gap in Member States' merger control systems this may lead to an unjustified reliance on referral mechanisms. Consequently, it becomes necessary to examine the extent of the regulatory gap to analyse if the gap exists in national merger control as well.

To ensure that the full scope of new-economy transactions that may affect the competition are regulated, and to examine the extent of the regulatory gap, chapter 4 thus investigated if it is consequently necessary to investigate if a similar regulatory gap exists within Member States' merger control systems. Currently, a large majority of Member States employ thresholds based on turnover. This implies that the current Article 22 EUMR framework would generally be ineffective as regards new-economy concentrations and that the regulatory gap in the EUMR may exist within individual Member States as well. Austria and Germany have recently adopted thresholds that target the value of the transaction. This development demonstrates an awareness of the detrimental anti-competitive harm that may arise where harm-related-errors occur in regards to new-economy concentrations. In light of the need to close the possible regulatory gap on a national level, the thesis examined possible harmonisation under Article 114 TFEU and the effect of the internal market. It was argued that the internal

market could be considered to create an implicit duty for national reform due to Member States' Treaty obligations to safeguard the internal market. However, because merger control is a politically sensitive area, and because of the particular criteria in Article 114 TFEU, it was found that harmonisation under Article 114 TFEU would constitute an unrealistic, and potentially disproportionate, measure.

Consequently, the thesis examined an alternative solution to harmonisation. An organic solution would be to utilise the process of spontaneous harmonisation; a process through which Member States' legal systems are influenced by each other and, in particular, influenced by the Commission. By looking at legal development in the EU, one may note that such a process does not cause the issue regarding sovereignty and subsidiarity, which an Article 114 TFEU harmonisation measure likely would. However, the spontaneous harmonisation is incremental and a potential problem is thus that significant market changes within the new-economy may occur before the process has resulted in legislative reform in national systems.

Spontaneous harmonisation would likely be triggered by any potential EU reform, due to spontaneous harmonisation being foremost influenced by EU law. However, it may also arise through the influence of the Commission's public consultation and Commission practice in regard to new-economy concentrations. Furthermore, other Member State jurisdictions may be highly influential, such as Sweden, Austria or Germany. Whilst an EUMR reform is thus not crucial for spontaneous harmonisation, reform is necessary from the perspective of avoiding that the legislation solely relies on referral mechanisms to adequately regulate new-economy transactions. National reform through the process of spontaneous harmonisation also allows for the full scope of new-economy transactions to be regulated and improves the operability of EUMR referral mechanisms.

Having demonstrated that there is a need for national reform through implementing thresholds capable of bringing new-economy transactions within merger control review, chapter 5 examined and analysed two alternative threshold models to turnover- and size-of-transaction-based

thresholds for a holistic discussion of national reform. These were selected against a background of functionality and scholarship and consists of thresholds based on market shares and a voluntary notification model. Whilst these models' application within the EUMR is not excluded, chapter 5 focused on national reform due to the findings of the thesis regarding the need for national reform to mitigate the regulatory gap in the EUMR and to better justify the current reliance on referral mechanisms.

Two perspectives were examined: the models' efficiency in bringing new-economy transactions within the relevant merger control laws and if the models uphold general principles of law and guiding recommendations. The criteria on notification systems by recommendations consist of the models being adaptable to the local economy, be transparent, clear, effective, efficient and respectful of the rule of law. In accordance with best practices, the thresholds should also establish a local nexus, and minimise cost-related-errors and harm-related-errors. Cost-related-errors relate to thresholds that cause over-enforcement or are overly inclusive. This materialises as a cost-related-error because resources are wasted where NCAs must examine a concentration that does not cause anti-competitive effects, or where parties must spend significant resources in investigating if a transaction is notifiable. Harm-related-errors instead refer to under-enforcement. This materialises where an anti-competitive transaction avoids, or is excluded from, notification under merger control. Thus, anti-competitive harm may reach the market because there is no review or required approval of the transaction.

Utilising these perspectives and this framework, the thesis firstly evaluated the effectiveness of a notification system based on market shares. Whilst this model may act as a good indicator of a transaction's competitive impact, several issues were detected as regard general principles of law. In particular, the calculation of market shares would require parties to make decisions as to how to define the market, which may be difficult to determine and thus lead to a lack of legal certainty and predictability. Market shares may act as a good indicator for market power and market changes resulting from M&A activity, however, considering the issues regarding legal certainty and

predictability, one may argue that it can be used as an indicator but not as a basis for notification thresholds.

A better option was detected when examining a version of a voluntary notification system. This form of a voluntary notification model, with clear guidance issued by the NCA and the opportunity for pre-transaction contact between the parties and the NCA, may be the best model as regard capturing new-economy transactions within merger control. Here it is found that the voluntary nature of notification does not increase cost-related-errors as it may act as a complement to current thresholds, thus targeting transactions that currently avoid, or are excluded from, notification and review. However, the voluntary notification model's efficiency is also dependent on NCAs having residual jurisdiction, similar to the Swedish model examined, whereby NCAs may oblige parties to notify a concentration. The residual jurisdiction hinders harm-related-errors, through representing a threat against a transaction's completion because of the potential for *ex post* intervention, and may act as a deterrent against forum-shopping as well. Similarly, the guidance and reference-points issued by NCAs, in regards to when a voluntary notification may be beneficial, should not be the exact same across Member States due to the local nexus criteria, which in itself may decrease forum-shopping. However, a voluntary notification system of this sort must also be combined with an effective monitoring system for NCAs, to ensure that the agency in question is adequately aware of transactions that occur within the market. Subject to these criteria, the voluntary model would likely be the optimal model for closing the regulatory gap that exists within merger control as it eliminates the current under-enforcement, allows parties to transcend the current exclusion from gaining a regulatory approval, and simultaneously may ensure the proper regulation of new-economy transactions leading to a safeguarding of the market.

The above discussion results in answering the research question examined by the thesis in the following fashion: there is currently a regulatory gap within the EUMR in regards to new-economy transactions. These transactions currently avoid, or are excluded from, effective regulatory scrutiny because thresholds for notification rely on turnover, something that

is not a definite within the new-economy sector and in particular new-economy target companies in an M&A transaction. The regulatory gap transcends the EUMR and may also be found within singular national systems, which means that it may be more problematic than it first appears. It is found that the EUMR currently relies upon referral mechanisms, in particularly Article 4(5) and Article 22 EUMR, to minimise the regulatory gap, however these may be falsely relied on as Member States are not able to adequately capture new-economy transactions within their own merger control systems. In particular, this affects Article 22 EUMR as it requires that a Member State captures the transaction to subsequently refer the case to the Commission. The operability and efficiency of Article 4(5) EUMR is also affected as a party's ability to utilise it to apply for Commission jurisdiction is subject to the transaction being capable of review in at least three Member States. The new-economy sector will become increasingly important in society, due to its relationship with the modern economy, and there is potential for irreparable harm on the market arising out of strategic acquisitions. Consequently, there is a clear need for reform to close the existing regulatory gap. On an EU level, such reform may come as a result of the public consultation conducted by the Commission. On a national level, the process of spontaneous harmonisation may see an incremental process of reform across Member States. Where national reform occurs, the best model for closing the regulatory gap would likely be one that builds on a voluntary notification scheme subject to a residual jurisdiction for NCAs and an effective monitoring system to gain awareness of transactions on the market.

The thesis has built this conclusion based upon a legislative gap existing in the EUMR, but also on a national level, within national merger control systems. Subsequent discussion is mainly based on current awareness, case law, academic scholarship as well as evidence from national systems. The variety of sources demonstrate that the topic of effective merger control vis-à-vis new-economy concentrations is gaining heightened attention and recognition as a current problem.

Further research may prove necessary. Developments of interest may in particular be the outcome of the Commission's in-depth investigation into

Apple/Shazam and future cases of similar characteristics. Due to the increased focus on new-economy concentrations, this case may become relevant precedent for Commission praxis and competition law. Other points of interest would be potential proposals stemming from the Commission inquiry or legal developments on a national level from a *de lege ferenda* standpoint. In particular, further research should be made regarding the effects of obligations pertaining to the internal market and of alternative thresholds to more accurately predict the outcome of spontaneous harmonisation.

There are certain aspects of potential reform that one must be wary of. The cost and burdens on NCAs and the Commission that are associated with reform should not be ignored, thus, it is important to not be overtly drastic or create a system that is too complex. One should also not underestimate the burden that will be placed on all parties that are involved in a transaction. Whilst it must be ensured that the market, and consumers, are not harmed through anti-competitive M&A activity; one must also ensure that M&A activity overall is not harmed by reform due to the many economic, socio-economic and industrial benefits that M&A activity may produce. Any new system must thus balance several factors. However, new-economy concentrations must be subject to effective merger review, and measures must be taken, due to new-economy concentrations' economical and societal importance and impact on both the global and internal market.

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