FACULTY OF LAW
Lund University

Markus Porkka

# Capturing killer acquisitions in the digital sector: Article 102, EU Merger Control and Commission's approach

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Supervisor: Anna Tzanaki

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# Summary

The ‘killer acquisition’ -phenomenon has been a subject of heated discussion for past several years. It usually describes as a situation where the target company, commonly a start-up, is acquired by an incumbent and its innovation products are discontinued. This leads to a loss of both competition and innovation, causing a harm to consumer welfare. Their prevalence is still mostly unknown, but research has shown that as much as 6% acquisitions in the pharmaceutical sector was of this nature. This has led to a speculation about the extent of this phenomenon in the digital sector. This is because the problem may be even more pronounced there: business model of many start-ups is not initially focused on generating income but attracting userbase. For this reason, their competitive potential is not necessarily reflected by their turnover, which means that they are not caught by the EU merger control thresholds. Even when suspected killer acquisition is investigated by the Commission, it faces challenges with the review. The reason is that the technological and digital market is constantly evolving as a result of new innovations and radical shifts in business models.

This paper tries to tackle this phenomenon by mapping its extent, the level of harm, and the merited response if any. Many latest studies in the area will be investigated along with the reports and studies compiled by the competition authorities. The sources narrow the suspect group in need of regulation down to GAFAM-companies. Some popular suggestions to deal with them, such as lowering the thresholds, transaction value-based thresholds, and ex post control, are discarded as disproportionate for the stated aim. New guidance on Article 22 Referral is similarly found to not suit this task. Instead, Article 102 TFEU is proposed as a preferable alternative. It is found that supplemented with the Digital Markets Act, it is possible to have an effective ex-ante and ex-post toolset, which would enable the Commission to tackle the killer acquisition in the digital sector.

# Contents

# Preface

I would like to express my gratitude for being granted the privilege of studying in the prestigious Lund University. My professors and lecturers have provided me with professional knowledge, which is bound to help me with my career in this field. The experience has more than met all my expectations. Special thanks go to my supervisor Anna Tzanaki, who provided me with comprehensive guidance during my thesis process along with some of the most fantastic lectures I have had pleasure of attending to.

# Abbreviations

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| EU | European Union |
| DMA | Digital Markets Act |
| GAFAM | Google, Amazon, Facebook, Apple and Microsoft |
| OECD | Organization for Economic Co-operation and Development |
| SIEC | Significant impediment of effective competition |
| SSNIP | Small Significant Non-Transitory Increase in Price |
| TEU | Treaty of the European Union |
| TFEU | Treaty on the Functioning of the European Union |

# 1. Introduction

A company is usually acquired by another for deemed efficiencies and synergies that the merger[1] would produce. This may be because of a unique innovation, intellectual property product, personal or other similar attributes that makes the target company attractive for the acquirer. Economics scholars have observed that these kinds of acquisitions are usually beneficial for broader 'consumer welfare', the standard under which all mergers are judged.[2] The belief is that they efficiently allocate resources and result in an improved production, distribution of goods, and promotion of both technical and economic process, ultimately trickling down to consumers who get to enjoy the end products.[3] However, it has been noted that sometimes mergers, while beneficial for companies themselves, may harm the competition itself, or cause some other form of potential harm to consumers. EU merger control is governed by the EU Merger Regulation: it exists along with Articles 101 and 102 TFEU and related regulation to prevent these kinds of anti-competitive effects. EU Merger Regulation obligates the parties to notify to the Commission mergers which include a Community dimension. It is then up to the Commission to determine whether a merger significantly impedes effective competition in the common market or a substantial part of it. This is achieved with SIEC-test, which is the substantive test under which mergers are reviewed.[4] Yet, the EU merger control turnover thresholds have been unable to capture all harmful transactions, which has been recently exemplified by the 'killing acquisition' theory of harm.

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[1] Merger is a synonym for concentration. It, in turn, is defined by Article 3 of the EUMR as a situation where a change of control on a lasting basis result from the merger or the acquisition of two more previously independent, among other things. Many referred studies use more internationally used terms such as 'merger' and 'transaction', which is the approach this paper adopts to keep the text consistent.

[2] Whish R and Bailey D, Competition Law (7th edn, OUP 2012) p. 813,
Horizontal Merger Guidelines, paragraphs 38 and 81; Non-Horizontal Merger Guidelines, paragraph 13: It is assumed that mergers increase incentive to innovate, which in turn increases the competitive pressure for the rivals.

[3] ibid

[4] Whish R and Bailey D, Competition Law (7th edn, OUP 2012) p. 829

Killing acquisition traditionally describes a situation where an established company acquires the target company with the sole aim to "kill" its innovation project, and thus pre-empt future competition.[5] For example, the company could judge that it is cheaper to buy a fledgling start-up as a preventive measure than risk it successfully outcompeting the company's own rival product. And because the company already has an established product in the market, it does not have an incentive to continue with the start-up's product as it would just compete against its own already existing product. As a result, the acquired innovation product is discontinued, depriving consumers not only from the alternative but also from beneficial competition between firms.[6] In a paper published by Colleen Cunningham, Florian Ederer, and Song Ma, it was established that around 5-6% of acquisitions in the pharmaceutical sector could be categorized under the label of potential 'killer acquisition'[7]. These occur usually below the merger control thresholds which are designed to capture mergers with high turnover, hence the acquisitions with low turnover start-ups are unlikely to be reviewed.

This is part of a broader discussion about whether the current EU merger control is able to prevent established companies from acquiring nascent competitors. Margrethe Vestager stated that the promising ideas from small innovators are at risk disappearing, "*… not because they're not worth it, not because they couldn't be successful with customers, but because 1bigger businesses buy them – in order to kill them*."[8] In the digital sector, it is common for start-up concentrate on attracting a

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[5] OECD, 'Start-Ups, Killer Acquisitions and Merger Control – Note by the European Union', DAF/COMP/WD(2020)20 summary p. 2 paragraph 2

[6] Alexiadis P and Bobowiec Z, 'EU Merger Review of "Killer Acquisitions" in Digital Markets - Threshold Issues Governing Jurisdictional and Substantive Standards of Review' [2020] 16(2) Indian Journal of Law and Technology p. 67-68

[7] OECD, 'Start-Ups, Killer Acquisitions and Merger Control – Note by the European Union', DAF/COMP/WD(2020)20 <https://www.oecd.org/competition/start-ups-killer-acquisitions-and-merger-control.htm> accessed 20 May 2022 p. 4-5.

[8] Vestager M, 'Shaping Competition Policy in the Era of Digitisation' (2019), <http://ec.europa.eu/competition/scp19/>, at 6:40.

large user-base before monetizing its services.[9] For this reason, their competitive potential is not reflected in the turnover and their acquisition goes unnoticed by the competition authorities. For example, Facebook/Whatsapp merger did not meet the turnover thresholds of the EU Merger Regulation and only came under the Commission's review after Facebook requested it.[10] It was cleared by the Commission after a Phase 1 investigation, deeming there were no anticompetitive effects. Since then, Facebook has consolidated its market position in the digital markets and many affiliated actors have criticised the clearance as a mistake[11]. Some have argued that this is akin to killer acquisitions seen in the pharmaceutical field. However, in the digital sector it is more common for the acquirer to integrate the target product into its own ecosystem instead of discontinuing it. The consumer harm comes not so much from the discontinuation of the product but from making the markets uncontestable due the consolidation of the economics of scale and scope.[12] It has been reported that 'GAFAM' companies (Google, Amazon, Facebook, Apple and Microsoft) have acquired hundreds of smaller companies without being caught by merger control[13] and the Commission have acknowledged that at least some anti-competitive mergers are bound to take place[14]. This would suggest that the challenge for EU merger control regarding the killer acquisition phenomenon is twofold: first, successfully capturing potential killer acquisitions, and secondly, the substantive assessment of them.

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[9] Crémer J, de Montjoye Y A and Schweitzer H, 'Competition policy for the Digital 15 Era' (2019), p.110
[10] Baxter W, 'The definition and measurement of market power in industries characterized by rapidly developing and changing technologies' [1984] 53(3) Antitrust Law Journal 718; Crémer J, de Montjoye Y A and Schweitzer H, 'Competition policy for the Digital 15 Era' (2019), p.119
[11] Cabral L, Haucap J, Parker G, Petropoulos G, Valletti T, van Alstyne M, 'The EU Digital Markets Act A Report from a Panel of Economic Expert' (2021) p. 24
[12] Alexiadis P and Bobowiec Z, 'EU Merger Review of "Killer Acquisitions" in Digital Markets - Threshold Issues Governing Jurisdictional and Substantive Standards of Review' [2020] 16(2) Indian Journal of Law and Technology p. 70-71
[13] Commission, 'COMMISSION STAFF WORKING DOCUMENT EVALUATION of procedural and jurisdictional aspects of EU merger control {SEC(2021) 156 final}' SWD(2021) 67 final, p. 36
[14] ibid, p. 35

As seen with Facebook/Whatsapp, even if a case is reviewed by the Commission, it is not necessarily going to prevent the merger from occurring or even require basic remedies from the parties. The challenge is multilayered: for example, as the future of a start-up is uncertain, the counterfactual – a predictive exercise to simulate what would happen in the absence of the transaction – is almost impossible to successfully conduct. For this reason, the Commission would benefit from updating its assessment methodology as well. It has acknowledged the challenge these problems pose, and as a response in 2021 a new 'Guidance on Article 22 Referral' was published. The Commission has bolstered its toolset further with the Digital Markets Act, which is estimated to come into force in 2023. Both of these were, among other things, aimed to tackle the previously described problems by making referring and notification of the mergers to the Commission more flexible. Yet these measures have been criticized for being overreaching and resulting in a legal uncertainty[15]. At the same time some people do not think the Commission has gone far enough. There have been more drastic proposals about revamping the thresholds[16], adding transaction-based thresholds as an additional layer[17] or even establishing a post-merger review akin to the monopolization regulation used in the US.[18] This thesis aims to address the most empirically valid of these alternative suggestions and analyse necessity of their inclusion to the current EU competition toolset under light of Union's principles. The intention is to shed light on the challenge posed by killer acquisitions in the digital sector and uncover the best approach for competition authorities going forward.

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[15] Latham & Watkins, 'New guidance on Article 22 EUMR referrals to the European Commission' [2021] Antitrust Client Briefing, Latham & Watkins p.5

[16] Alexiadis P and Bobowiec Z, 'EU Merger Review of "Killer Acquisitions" in Digital Markets - Threshold Issues Governing Jurisdictional and Substantive Standards of Review' [2020] 16(2) Indian Journal of Law and Technology MARKETS p. 72

[17] Crémer J, de Montjoye Y A and Schweitzer H, 'Competition policy for the Digital 15 Era' (2019), p.113

[18] OECD, 'Start-Ups, Killer Acquisitions and Merger Control – Note by the European Union', DAF/COMP/WD(2020) p. 47 <https://www.oecd.org/competition/start-ups-killer-acquisitions-and-merger-control.htm> accessed 20 May 2022

## 1.1 Purpose and research question

This paper is going to study whether there exist sufficient legal tools to address the challenge posed by killer acquisitions in the digital sector. More specifically, the purpose is to determine whether there is need for further amendments to tackle this problem in light of the Union's aims, principles and laws. To fulfil the purpose of this paper, the following research question will be answered:

*In light of the Union's aims, principles and laws, is the present state of EU merger control sufficient to address the challenge posed by killer acquisitions in the digital sector?*

In order to answer the main research question, the following sub-questions will be answered:

*1. How to define the 'killer acquisition' theory of harm in the digital sector and to what extent are such potentially anticompetitive transactions captured by EU merger control? What is an appropriate level of action in light of Union's aims, principles and laws?*

*2. Is Article 102 TFEU a suitable tool to address killer acquisitions in the digital sector?*

*3. Are the Guidance on Article 22 Referral and the Digital Markets Act suitable tools to address killer acquisitions in the digital sector compared to any alternatives?*

There exist many different takes on this topic. In the EU, the Commission recently published its staff assessment report on the functioning of the EU merger control. The Furman, Crémer, and Stigler reports have offered several noteworthy observations and solutions regarding amendment of the EU merger control. Additionally, the OECD has published a paper which consolidates many academic proposals and studies. This thesis reviews this material in light of Union's aims, principles and laws to find the most suitable approach forward. It notably differentiates itself by analysing Article 102 of the TFEU as an alternative to amendment of the EU Merger Regulation. So far, no one has investigated its application in detail within this context. This will be supplemented

by comparison with the recent steps taken by the Commission, the Digital Markets Act and the Guidance on Article 22 Referrals.

## 1.2 Methodology and limitations

This subject is at a complicated intersection between legal, economic, and political considerations, and for this reason it is appropriate to use traditional qualitative research. However, with regard to its legal aspects, this paper utilizes a legal dogmatic method. It can be described as research that; ”*aims to give a systematic exposition of the principles, rules and concepts governing a particular legal field or institution and analyses the relationship between these principles, rules and concepts with a view to solving unclarities and gaps in the existing law*.”[19] To put it simply, the legal dogmatic methods uses sources of law to solve a legal problem by applying principles and rules derived from the legal text to it. [20]This is also called a teleological construction,[21] an interpretation of a provision in the light of its aim.

In terms of materials, the legal dogmatic method usually employs generally accepted sources of law, such as legislation and case law. As our interests lie in the context of EU law, primary law (such as the Treaties), general principles of law and secondary law will be considered, out of which especially the EU Merger Regulation and Article 102 of the TFEU are worth to highlight as relevant. Article 17 of the Treaty on European Union (TEU) endows the Commission with power to

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[19] Smits J, ‘What is legal doctrine? On the aims and methods of legal-dogmatic research’, M-Epli Maastricht European Private Law Institute Working Paper No. 2015/06 (Faculty of Law Maastricht University 2015) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2644088> accessed 25 May 2022

[20] Peczenik A, ‘Legal doctrine and legal theory’ (2005), A Treatise of Legal Philosophy and General Jurisprudence (ed. Roversi, Corrado), p. 814-815. In this paper, the reader can see this practically applied when the law is first described in relation to the research question which is then used as a necessary foundation when formulating a recommendation in the light of Union’s aims, principles and laws to the problem.

[21] ibid p. 24.

make rules, regulations, and guidelines regarding the EU's competition policy. It bases its opinions on soft law instruments such as impact assessment and staff assessment reports, which will be studied for a more comprehensive understanding.

Some necessary delimitations have been made for the purposes of this paper: as this is primarily a legal study, more extensive economic considerations will not be made, even though some important studies will be used as a reference point. The political aspects on the background will likewise be touched on but are not the focus of the research. For similar reasons, the substantive assessment based on economic considerations – the appropriateness of the SIEC-test, its replacement with the balance of harms or innovation-approach – is out of the scope of this paper. Finally, the first sub-question has been addressed by many previous studies, some of which provide conflicting or outdated views. For the interests of this research, only proposals with an adequate level of empirical evidence will be considered. This is to keep Section 3 concise and to ensure an appropriate level of quality.

## 1.3 Outline

The structure chosen for this paper can be simplified with the following structure: "what has been done, what could be done, what should be done" regarding the killer acquisitions in the digital sector. It starts with a descriptive exploration of EU merger control and the challenges that competition authorities face regarding the digital sector in Section 2. After that, it moves to Section 3, which analyses the characteristics of the killer acquisition theory of harm and the level of action it merits. Thus, the first sub-question will be answered. This enables addressing the second sub-question, which will be the main focus in Section 4. There, both the positives and negatives with application of Article 102 of the TFEU will be analysed. With this as a background, the

Commission’s chosen approach will be dealt with in Section 5, which will be analysed against the existing legal toolset. After that, it is possible to give an answer to the research question and fulfil the purpose of this paper. Section 6 will conclude this research.

# 2. Existing legal framework and enforcement gap in the digital sector

As it has previously been touched upon, EU merger control rules are contained in the EU Merger Regulation, more properly known as Council Regulation (EC) No 139/2004 of 20 January 2004. The EUMR was established to close a gap that Article 102 of the Treaty of European Union (henceforth, 'TFEU') was unable to address. Article 102 of the TFEU had previously been used to tackle problematic mergers by dominant firms suspected of a market abuse, but it was deemed limited because it could only be used to deal with the abuse after establishing the dominance *ex post*, i.e. after it had already occurred[22], among other things[23]. Meanwhile, the EU Merger Regulation was designed to address the anticompetitive effects *ex ante*, before it happened.[24]

This is necessarily a predictive exercise, which requires a theory of competitive harm to determine why the merger activity would cause the market to work less well for consumers.[25] One could ask, why is the EU Merger Regulation needed? Is it not enough that the market abuse will be investigated after it has occurred? The answer is multilayered: first, ex post investigations under Article 102 are both lengthy and complex, requiring immerse resources that limit its usage.[26] Secondly, merger control is also meant to maintain competitive market structures, as it is deemed that these will lead to better outcomes for consumers.[27] In the next part this paper is going to give a brief overview of the relevant elements of the European Union's competition aims, the EU Merger

[22] Jones A and Sufron B, 'EU competition law: text, cases, and materials', (7th edn OUP 2019) p. 1067-1068
[23] It also failed to capture non-collusive oligopolies and other companies that did not establish dominance yet hampered the competition.
[24] Jones A and Sufron B, 'EU competition law: text, cases, and materials', (7th edn OUP 2019) p. 1067-1068
[25] Whish R and Bailey D, Competition Law (7th edn, OUP 2012) p. 818
[26] ibid, p. 817
[27] ibid, p. 817 and Case T- 102/96 Gencor v Commission [1999] ECR II- 753, [1999] 4 CMLR 971, para 106

Regulation, and various other tools that supplement it to enable broader discussion about the suitability of the academic proposals and the Commission's chosen approach regarding killer acquisitions in the digital sector.

## 2.1 The European Union's competition aims

The objective of the European Union's competition rules is to ensure the proper functioning of the internal market. More specifically, Article 3(3) Treaty on the European Union provides that the EU shall establish an internal market which includes a system ensuring that competition is not distorted.[28] It is based on the theory that effective competition will put pressure on the different businesses to put the best products with the most affordable price in the market. This, in turn, drives innovation, furthers economic growth and ensures consumer welfare.[29] The Treaty on the Functioning of the European Union (TFEU) provides rules which establish restrictions aimed to prevent distortions on the internal market such as Article 102 of the TFEU. It prohibits abuse of market power by dominant undertakings when it affects trade between Member States. The Commission has been endowed with powers to take the appropriate measures to ensure effective competition, establishing the EU merger control system to this end. Its objective is to prevent firms from acquiring a degree of market power that could pose a threat to consumer welfare.[30]
To this end, it has established the EU Merger Regulation. This is to be used in the accordance with the principles of an open market economy with free competition[31], legal certainty[32], non-

[28] Article 3(3) Treaty on the European Union and Protocol 27 to the Treaties
[29] Jones A and Sufron B, 'EU competition law: text, cases, and materials', (7th edn OUP 2019) p. 27
[30] ibid, p. 1058
[31] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (henceforth the EU Merger Regulation) paragraph (6)
[32] ibid, paragraph 11

discrimination[33], and fundamental rights[34], applying the rest of the general principles of the European Union such as the principle of proportionality and subsidiarity along with them.

## 2.2 Jurisdictional threshold

It is important to emphasize that there is no uniform system of merger control that all countries share. Though their domestic merger rules contain many similarities, there is considerable variation between regulatory standards that merging parties have to account for. All EU Member States, expect Luxemburg, have established their own agency, called national competition authority, to monitor merger rules of their own respective territories. However, as explained in the introduction, those with a Community dimension must be notified in advance to the Commission, which has exclusive rights to investigate them[35], also known as the principle of 'one-stop shop' in merger control. This will be determined by the turnover of the undertakings concerned, an approach which aims to estimate the economic resources that would be combined due to the merger.[36] Article 1(2) of the EU Merger Regulation establishes that merger has a Community dimension where:

> *a) the combined aggregate worldwide turnover of all the undertakings concerned is more than €5,000 million; and*
>
> *(b) the aggregate Community- wide turnover of each of at least two of the undertakings concerned is more than €250 million,*
>
> *unless each of the undertakings concerned achieves more than two- thirds of its aggregate Community- wide turnover within one and the same Member State*[37]

[33] ibid, paragraph 22
[34] ibid, paragraph 36
[35] Whish R and Bailey D, Competition Law (7th edn, OUP 2012) p. 839
[36] ibid, p. 839
[37] EU Merger Regulation Article 1(2)

This is bolstered by Article 1(3) which establishes additional turnover requirements. The turnover is calculated from the net turnover of the previous financial year and from the ordinary activities of the company in question.[38] While it has been acknowledged that this mechanism fails to capture some mergers with substantive cross-border effects, it has been deemed that generally these turnover thresholds provide an effective and easy-to-understand system which has earned praise from stakeholders.[39] It has been also noted that mergers that avoid thresholds can still be referred to the Commission by the Member States under Article 4(5)[40], which enables parties themselves to refer a merger lacking a Community dimension to the Commission. Article 22 enables the Member States to do the same. It is noteworthy that the proposed Article 12 of the DMA would obligate 'gatekeepers'– basically synonymous with GAFAM-companies – to notify any merger involving providing services in the digital sector irrespective whether national or the EUMR merger turnover thresholds are met. This will be discussed in detail in Section 5.

## 2.3 Defining the market in the digital sector

Even with the transaction successfully being caught by merger control, the relevant market still needs to be defined. Before the Commission can start its antitrust procedure – whether it will be under Article 101 of the TFEU, 102 of the TFEU, or the EU Merger Regulation – it needs market

[38] EU Merger Regulation Article 5
[39] Staff working paper (SEC (2009) 808 final/2), paragraph 28.
[40] It provides a pre-notification possibility for the merger parties to make 'a reasonable submission' and request for jurisdiction over the transaction to be handed over to the Commission. While it is not necessarily clear from the outset, there are real practical reasons why this would a preferable instead of having national competition authorities conduct the investigation. As every Member State - excluding Luxemburg - have their own merger control laws, the merging parties with cross-border effects would have to produce multiple filings in different countries under varying rules. This is economically undesirable, making 'one-stop shop' merger scrutiny by the Commission the simplest alternative. The requirement is that the merger is capable of being reviewed in at least three Member States and no one of them expresses disagreement over the transfer. When there is agreement, it is deemed that the merger has a Commission dimension and the provisions of the EUMR apply.

definition to identify the boundaries of competition for the companies in question.[41] This is achieved usually by first assessing the alternatives to product or area from the customer's perspective, giving a measure of the companies' market power. The Commission has published a *Notice on the relevant market for the purposes of Community competition law* (henceforth, 'Market Definition Notice') regarding its practical application.[42]

The digital sector, in turn, is comprised of the advertising, internet, software and media industries.[43] In the latest Commission staff assessment it was found that one of the challenges has been defining the market in the rapidly evolving, dynamic markets[44] characterized by technological products.[45] As a result, the relationships of substitutability between products are quickly-changing, and the Commission has to consider the expected changes: for example, in M.7018 – Telefonica Deutschland/E-Plus case the Commission considered 2G, 3G and 4G constitute the same market even before 4G was offered.[46] The main challenge is with multi-sided platforms, so-called 'digital ecosystems'. Inside these platforms the companies and users benefit from both direct and indirect network effects between each other, with many services being offered at zero monetary price.[47] This has caused difficulties for competition authorities as this makes it hard to measure "*the value of changes in the quality of the services offered*."[48] At the same time many firms have modeled their business around collecting, analysing and selling data, such as Google's search results or ads in

[41] Whish R and Bailey D, Competition Law (7th edn, OUP 2012) p. 25-27
[42] Paragraph 4 of the Notice.
[43] Commission, 'COMMISSION STAFF WORKING DOCUMENT EVALUATION of procedural and jurisdictional aspects of EU merger control {SEC(2021) 156 final}' SWD(2021) 67 final p. 34. It is noteworthy that these services can be technological products as well, such as apps, algorithms, search engines, software's, and thus overlapping with the technological sector.
[44] Commission, 'COMMISSION STAFF WORKING DOCUMENT EVALUATION of the Commission Notice on the definition of relevant market for the purposes of Community competition law of 9 December 1997 {SEC(2021) 295 final}' SWD(2021) 200 final results p. 31
[45] ibid p. 40
[46] ibid p. 41.
[47] ibid p. 54-55
[48] Crémer J, de Montjoye Y A and Schweitzer H, 'Competition policy for the Digital 15 Era' (2019), p.43

Facebook's social network. They can finance their services by selling that 'attention' to the advertisers or other interested actors, making the business model economically viable despite its seemingly zero-monetary price.[49] According to the Commission's practice, these kinds of multisided markets can be understood as a single market for the whole platform ('single-market approach') or as a separate relevant markets for different sides of the platform ('multi-markets approach').[50] The choice between these should be done after assessing the platform's business model, 'platform typology' (interaction between different sides) and factors such as the substitution between products from the perspective of users.[51]

For this reason, some more classical approaches, such as the SSNIP-test, may be hard to apply[52]: it is used to understand what consumers would do in the event of a price increase while many digital platforms are free for one side of users in a classically understood sense.[53] Yet the Commission has other tools it can employ, such as SSNDQ-test ('small but significant non-transitory decrease in quality')[54]and the SNNIC-test ('small but significant non-transitory increase in cost'), out of which the former was used successfully in Google Android case.[55] While this area is out of the considerations of this paper, it is important to note that despite challenges, the Commission has the capacity to adapt to the rapidly evolving, dynamic digital markets with some empirical success. This is relevant background information when assessing policy proposals in Section 3, Article 102 TFEU in Section 2 and the Commission's approach in Section 5.

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[49] ibid, p. 55-56
[50] Commission, 'COMMISSION STAFF WORKING DOCUMENT EVALUATION of the Commission Notice on the definition of relevant market for the purposes of Community competition law of 9 December 1997 {SEC(2021) 295 final}' SWD(2021) 200 final p. 54
[51] ibid.
[52] ibid p. 37-38 SSNIP-test is short for '*Small Significant Non-Transitory Increase in Price'*. It should be noted that this is only one of the various ways to determine the market power.
[53] Federal Ministry for Economic Affairs and Energy, 'A new competition framework for the digital economy Report by the Commission 'Competition Law 4.0'' p. 27-28.
[54] Crémer J, de Montjoye Y A and Schweitzer H, 'Competition policy for the Digital 15 Era' (2019) p. 45
[55] Case AT.40099 Google Android Commission Decision 2019/C 402/08 [2019]

## 2.4 Substantive assessment

When looking at the substance, the Commission will conduct a market analysis, examining factors such as the parties' market shares, potential competitors, an HHI analysis and the stability of the market shares among other things that are relevant for the conditions of the market.[56] This is assessed with a substantive test.[57] When Article 102 was used for the mergers, the compatibility of the merger with the internal market was the dominance test, which measured whether the merger strengthened a dominant position. However, as this failed to capture certain transactions which would disrupt competition[58], there was a need for new approach. The SIEC-test was introduced under the EUMR to close this gap.[59] The Commission now investigates whether a merger would 'significantly impede effective competition.' The new case-law requires a causal link between the transaction and the deterioration of the competition.[60] The competitive assessment involves assessing the substitutability of the products, which gives an indication of the incumbent's market power.[61]

When the transaction involves competitors – i.e. a horizontal merger – it will be investigated whether the merger removes important competitive constraints (non-coordinated effects) increasing the market power of the parties and whether they are better positioned to limit competition among

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[56] Horizontal Merger Guidelines, paras. 14–21.
[57] ibid. A merger enjoys a presumption of compatibility when its market share is not more than 25% and HHI of 2000 and delta <150 is not exceeded. It is noteworthy that HHI-level only give indication about the competitive constraint. This is especially relevant in the digital sector due to its dynamic nature. Notably, in Cisco Systems v Commission it was found that a high HHI and considerably number of market shares would not in themselves indicate a significant impediment of competition for similar reasons.
[58] Such as the non-coordinated effects of mergers in oligopolistic markets.
[59] Whish R and Bailey D, Competition Law (7th edn, OUP 2012) p. 871
[60] ibid, p. 867.
[61] ibid, p. 22-23

themselves post-merger (coordinated effects)[62]. Within the context of killer acquisition phenomenon, these competitive constraints could take form of GAFAM-company eliminating potential competitors and innovation.[63] If there is a merger between parties at a different level of the supply chain – also known as non-horizontal or vertical merger – the Commission will inspect if there is any risk of anti-competitive foreclosure and whether the conditions for cooperation are enhanced.[64] In the digital sector, this could be related to access to data, technology or platforms.[65] There are also conglomerate mergers, a merger between totally unrelated companies.[66] For these competitive constraints could be caused by wide variety of integrated products offered by the merged entity, leading to foreclosure of competitors that are unable to compete with a similar level of variety.[67]

Finally, even if the Commission finds competition concerns, mitigating factors – such as countervailing buyer power, an ease of expansion by current competitors, a potential for new competitors to enter the market and other efficiencies that benefit consumers that can be attributed to the merger – can outweigh these concerns.[68] For the purposes of this paper, it is relevant to emphasize that this newcomer must enter the market within two years after the merger with a

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[62] Jones A and Sufron B, 'EU competition law: text, cases, and materials', (7th edn OUP 2019) p. 1060-1062
[63] OECD, 'Start-Ups, Killer Acquisitions and Merger Control – Note by the European Union', DAF/COMP/WD(2020)20 summary p. 6; Latham O, Tecu I, Bagaria N, 'Beyond Killer Acquisitions: Are There More Common Potential Competition Issues In Tech Deals And How Can These be Assessed?', [2020] CPI Antitrust Chronicle p. 3-4: When the competition authorities investigate whether the acquirer has significant market power, the potential 'nascent' competitor can function as a competitive constraint in the assessment. It is analysed whether the target could grow into an actual competitor using economic models. The attributes, such as whether target's innovation product can be integrated into the acquirer's ecosystem along with the target's userbase, could be examples of things to consider during this assessment. This can be exemplified by Facebook's acquisition of Instagram and WhatsApp. There, it was found that the assets (WhatsApp as a social media service and Instagram as a platform) constituted a separate market, and there was no threat for the competitive process. This outcome, of course, did not exactly turn out to be the case.
[64] Whish R and Bailey D, Competition Law (7th edn, OUP 2012) p. 877
[65] OECD, 'Start-Ups, Killer Acquisitions and Merger Control – Note by the European Union', DAF/COMP/WD(2020)20 2020 summary p. 6
[66] Jones A and Sufron B, 'EU competition law: text, cases, and materials', (7th edn OUP 2019) p. 1064-1065
[67] OECD, 'Start-Ups, Killer Acquisitions and Merger Control – Note by the European Union', DAF/COMP/WD(2020)20 summary p. 6
[68] Jones A and Sufron B, 'EU competition law: text, cases, and materials', (7th edn OUP 2019) p. 1116

sufficient scope to deter the anti-competitive effects caused by the merger, all while being profitable, timely and sufficient.[69] The entry of newcomers is usually a cause of beneficial competition and innovation, especially in the case of a maverick firm. Killer acquisitions are affecting this kind of potential competition.[70] The analysis of the transaction will be supplemented with the previously mentioned counterfactual, though it has been noted to be a poor fit when assessing acquisitions of young start-ups in the digital sector due to uncertainty factors. [71] The counterfactual analysis usually estimates the state of things 2-3 years into future: it has been criticized that this time period is insufficient due some effects becoming evident after more than 6 years.[72] Based on this investigation, the Commission will either clear the merger or prohibits it from occurring. It rarely rejects the transaction, instead accepting it conditionally subject to certain remedies to remove competition concerns.[73]

There are unique challenges present in the digital sector that must be taken into account during the assessment. The relevant innovation spaces and future developments are harder to identify due to its dynamic, fast nature for which the rules relating to other markets do not necessarily apply. For example, it is not useful to distinguish mergers happening in the digital sector with traditional view on the horizontal and vertical mergers. This is because complementary products may later transform into direct substitutes as seen with Google's acquisition of DoubleClick. There, Google gained an effective monopoly despite the transaction initially being seen as a vertical merger.[74] Another

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[69] Horizontal Merger Guidelines, para. 68
[70] OECD, Background note on OECD, 'Start-Ups, Killer Acquisitions and Merger Control – Note by the European Union', DAF/COMP/WD(2020)20 <https://www.oecd.org/competition/start-ups-killer-acquisitions-and-merger-control.htm> accessed 20 May 2022 summary, p. 8.
[71] ibid, p. 7. This is because the start-up has little to no prior history, which makes the Commission unable to use past history in the future estimates. This is especially problematic in the dynamic digital markets.
[72] OECD, Background note on OECD, 'Start-Ups, Killer Acquisitions and Merger Control – Note by the European Union', DAF/COMP/WD(2020)20 <https://www.oecd.org/competition/start-ups-killer-acquisitions-and-merger-control.htm> accessed 20 May 2022, p. 17.
[73] Jones A and Sufron B, 'EU competition law: text, cases, and materials', (7th edn OUP 2019) p. 1105-1106
[74] Cabral L, Haucap J, Parker G, Petropoulos G, Valletti T, van Alstyne M, 'The EU Digital Markets Act A Report from a Panel of Economic Expert' (2021) p. 26

challenge is that these owners of platforms can be at the same time 'gatekeepers' defining the rules while engaging in competition against other companies.[75] Their position enables them to gather large amount of data which can be combined to create synergies and spot start-ups with high innovative potential to be acquired, among other benefits[76]. For example, Facebook bought Onavo, a company specialized with spyware, with an explicit purpose of monitoring competing products to find those with vast growth rate and thus noteworthy future competitive threat. This is the reason it chose to acquire WhatsApp over Messenger, both companies with comparable properties.[77] While these kinds of mergers may enhance overall consumer welfare in a short-term, it may also cause a harm to the competitive process as it further strengthens the strong market position of incumbent. For example, Amazon can offer a wide variety of services for the users of its platform, retaining consumers while rival firms have to offer more service across a range of related markets to survive.[78] The competitive process as a whole might suffer if other companies become unable to successfully compete against the incumbent's integrated rival products.

## 2.5 Summary

In this Section, an overview of EU merger control and its relationship with the digital sector was given. High turnover cross-border transactions are captured by EU merger control or referred to the Commission by the Member States. The Commission will then review the merger, giving either

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[75] Crémer J, de Montjoye Y A and Schweitzer H, 'Competition policy for the Digital 15 Era' (2019), p. 6
[76] OECD, Background note on OECD, 'Start-Ups, Killer Acquisitions and Merger Control – Note by the European Union', DAF/COMP/WD(2020), <https://www.oecd.org/competition/start-ups-killer-acquisitions-and-merger-control.htm> accessed 20 May 2022 p. 10
[77]Cabral L, Haucap J, Parker G, Petropoulos G, Valletti T, van Alstyne M, 'The EU Digital Markets Act A Report from a Panel of Economic Expert' (2021) p. 6
[78] OECD, Background note on OECD, 'Start-Ups, Killer Acquisitions and Merger Control – Note by the European Union', DAF/COMP/WD(2020), p.3 <https://www.oecd.org/competition/start-ups-killer-acquisitions-and-merger-control.htm> accessed 20 May 2022; Crémer J, de Montjoye Y A and Schweitzer H, 'Competition policy for the Digital 15 Era' (2019), p. 49

clearance with or without remedies, or rejects it. It conducts this assessment by first defining the market, which can be challenging within the dynamic, evolving digital sector. There, online platforms can use their position as a gatekeeper to their advantage, which may have anticompetitive effects that the EU merger control is unable to review. This is because the distinction between traditional horizontal and vertical mergers may not be applicable, among other things. The result is that these online platforms may strengthen their established position, eliminate potential competition and extinguish innovation, harming the competitive process. The next Section will investigate this phenomenon in the context of killer acquisitions to figure out the appropriate level action.

# 3. Killer acquisitions in the digital sector – a true threat or just a mirage?

With the previously outlined information as a backdrop, this paper moves to establish fundamental foundations for the rest of the research – how should killer acquisitions in the digital sector to be defined? To what extend is there actual harm for competition? And what should be done about it? As previously alluded to, the term originated from the study conducted in the pharmaceutical sector, where the innovation project of a target company (usually a smaller start-up) was bought by a competitor and subsequently discontinued. Given that the circumstances differ considerably when it comes to digital markets[79], it is not necessarily possible to proceed with the same premise as laid out by this previous research. Moreover, the killer acquisition has since become a catch-all term that describes a situation where the competition will be harmed with the acquisition of a potential competitor causing an *"exacerbation of existing economies of scale and scope, leading to markets becoming uncontestable over time*."[80] This Section is structured as follows: 3.1. will review origins of the theory, investigates actors suspected of employing killer acquisition as a strategy in the digital sector and for what reason. With this understanding in 3.2. extent of the damage in the digital sector will be investigated. 3.3. inquires what level of action this damage merits under the principle of subsidiary, and 3.4. goes through relevant policy proposals under principle of proportionality. 3.5. will conclude this Section.

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[79] Carlson J, 'The Platform Competition and Opportunity Act Is a Solution in Search of a Problem' (2022), p. 1-2
[80] Alexiadis P and Bobowiec Z, 'EU Merger Review of "Killer Acquisitions" in Digital Markets - Threshold Issues Governing Jurisdictional and Substantive Standards of Review' [2020] 16(2) Indian Journal of Law and Technology, p.70

## 3.1 Background on the theory - what, who and why of the killer acquisition

More than 16,000 pharmaceutical drug projects were collected for the original study by Colleen Cunningham, Florian Ederer, and Song Ma.[81] They then observed those circumstances where there was an acquirer already in possession of an overlapping drug with similar attributes to the acquired drug and found out that acquired drugs were 3.7% less likely to be continued than when the acquirer was not in the possession of an overlapping drug.[82] This rose to 5.7% when compared to the projects that were not acquired.[83] They eventually arrive at the conclusion that 5.3% of the acquisitions can be considered killer acquisitions in the pharmaceutical sector.[84] Cunningham et al have described this phenomenon as a defensive strategy to pre-emp future competition with anticompetitive effects on the innovation. Even if the company continues the development of an acquired drug, it does not make sense for the acquirer to continue with its own overlapping product, as it would risk cannibalizing its own sales. These are called reserve killer acquisitions.[85] Whichever the situation, the consumers are deprived from additional choices which results in a detriment for consumer welfare.

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[81] Madl A C, 'Killing Innovation?: Antitrust Implications of Killer Acquisitions' (2020) <https://www.yalejreg.com/bulletin/killing-innovation-antitrust-implications-of-killer-acquisitions/> accessed 22 May 2022

[82] OECD, 'Start-Ups, Killer Acquisitions and Merger Control – Note by the European Union', DAF/COMP/WD(2020)20 <https://www.oecd.org/competition/start-ups-killer-acquisitions-and-merger-control.htm> accessed 20 May 2022 p. 30

[83] Cunningham C and others, 'Killer Acquisitions' [2021] 129(3) Journal of Political Economy <https://papers.ssrn.com/abstract=3241707> accessed 25 May 2022 https://papers.ssrn.com/abstract=3241707 p. 30

[84] Ibid, 38-39

[85] Caffarra C, Crawford G and Valletti T, 'How Tech Rolls: Potential Competition and 'Reverse' Killer Acquisitions', [2020] VoxEU, CEPR <https://voxeu.org/content/how-tech-rolls-potential-competition-and-reverse-killer-acquisitions> accessed 19 May 2022

Who are responsible for these acquisitions? While other actors can instigate killer acquisition as well, GAFAM companies remain as the main suspects. This is because of their unique position as the owners of online platforms which grant them with unparalleled access to data both from the users and their competitors.[86] With this knowledge they can make accurate prediction about potential future threats and strategic acquisitions which further cement their position.[87] Notably GAFAM-companies have acquired around 1000 firms since 2000[88], the British national competition authority finding more than 250 acquisitions in the digital sector in past 5 years in its jurisdiction alone.[89] On company specific level, the Lear report concluded that Google had acquired 168 and Facebook 71 companies since 2008, many of which were potential competitors.[90] There exist multiple studies with coherent models which demonstrate a possibility that these acquisitions may have pre-emptive motive.[91] Many high profile cases, such as Facebook/WhatsApp – where the Onava-program was used to spot WhatsApp's high innovative potential and potential competitive threat – and the result of Google/DoubleClick seem to indicate that these worries may be warranted.

How is this manifesting in the digital sector? It has been observed that acquisitions by GAFAM-companies rarely resulted in the product being directly discontinued: instead, they were integrated

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[86] Crémer J, de Montjoye Y A and Schweitzer H, 'Competition policy for the Digital 15 Era' (2019), p. 6
[87] ibid, p. 7
[88] Cabral, L., 'Merger Policy in Digital Industries, Information Economics and Policy', (2020), Working Paper. New York University and CEPR 01/21
Chiara et all, 'Shelving or developing? The acquisition of potential competitors under financial constraint' [2021].
G. Parker, G. Petropoulos, and M. van Alstyne, "Platform Mergers and Antitrust" (2021) Working Paper 40796, Bruegel 01/21.
[89] Furman, J., Coyle, D., Fletcher, A., McAuley, D. and Marsden, P., "'Unlocking Digital Competition. Report of the Digital Competition Expert Panel', (2019) HM Treasury Publications, London, p. 91
[90] Argentasi and otherst, 'Ex-post Assessment of Merger Control Decisions in Digital Markets Final report' [2019] Lear <https://www.learlab.com/wp-content/uploads/2019/06/CMA_past_digital_mergers_GOV.UK_version-1.pdf> accessed 25 May 2022 p. 10
[91] Cabral, L., 'Merger Policy in Digital Industries, Information Economics and Policy', (2020). Working Paper. New York University and CEPR 01/21
G. Parker, G. Petropoulos, and M. van Alstyne, "Platform Mergers and Antitrust" (2021) Working Paper 40796, Bruegel 01/21
Chiara et all, 'Shelving or developing? The acquisition of potential competitors under financial constraint' (2021). CEPR Discussion Paper No. DP15113
Letina and others, 'Killer Acquisitions and Beyond: Policy Effects on Innovation Strategies' (2021) CEPR Discussion Paper No. DP15167

into the acquirer's ecosystem to produce synergies that were deemed even beneficial for the consumers. This is a trade-off where innovation may increase while eliminating future competition.[92] For example, Facebook can offer better targeted ads by combining data on users across its multiple platforms. The cost-effectiveness of these ads is passed onto the consumers.[93] Moreover, being acquired can be a key driver of innovation for the start-up, for which it is a more profitable alternative to head-to-head competition.[94] Some academics have tried to differentiate these kinds of beneficial acquisitions that integrate innovation and efficiency from killer acquisitions by labelling them under a separate category of "tech acquisitions". [95] They are usually defined as the acquisition of start-ups with an enormous user base and valuable data but low turnover,[96] such as the circumstances surrounding WhatsApp before its acquisition by Facebook. It may be that these start-ups need to be acquired by a big company to be able to manifest the full potential of their innovation – the reason can be the know-how, finances or ability to combine it with other existing technologies that established firms can offer. This may enable the acquirer to offer better product which enhance the consumer welfare.[97] This is a common exit strategy for the start-ups.[98]

Yet sometimes they may grow up to offer effective competition if not acquired at the outset. The loss of a competitive restraint on the market is well established by the various studies and academic

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[92] Ezrielev J, 'An Economic Framework for Assessment of Innovation Effects of Nascent Competitor Acquisitions' (2021), p. 3
[93] Yan Lau, 'A Brief Primer on the Economics of Targeted Advertising' (2020) Economics Federal Trade Commission, <https://www.ftc.gov/system/files/documents/reports/brief-primer-economics-targeted-advertising/economic_issues_paper_-_economics_of_targeted_advertising.pdf> accessed 25 May 2022 p 11-12
[94] Cabral, L M B, 'Standing on the Shoulders of Dwarfs: Dominant Firms and Innovation Incentives' (2018), CEPR Discussion Paper No. DP13115 <https://ssrn.com/abstract=3235598> accessed 8 May 2022
[95] Crémer J, de Montjoye Y A and Schweitzer H, 'Competition policy for the Digital 15 Era' (2019) p. 117
[96] Whish R and Bailey D, Competition Law (10th edn, Oxford University Press 2021) p. 885
[97] Crémer J, de Montjoye Y A and Schweitzer H, 'Competition policy for the Digital 15 Era' (2019) p. 110
[98] Carlson J, 'The Platform Competition and Opportunity Act Is a Solution in Search of a Problem' (2022) p. 2-3

literature[99], demonstrating that the effects of these kinds of acquisitions on the consumer welfare are not as clear-cut as its advocates would make it seem. This is also known as *the theory of harm of nascent competitors* – while formally separate, it shares a considerable number of traits with the killer acquisition theory of harm. The main separating point is that the former can be applied more generally in circumstances where the potential competitive threat is removed while the latter adds one more layer where the competitor's product is also eliminated. [100] An OECD paper argues that the other defining trait of the killer acquisition theory it is necessarily horizontal in nature: this is because as a theory of harm scenario killer acquisition can only take place in the markets where the start-up and the acquirer have overlapping products.[101] Many studies on this subject do not separate between these two theories of harm, and the term 'killer acquisition' is used for both interchangeably[102]. This paper will adopt this view: while at later points acquisition of a nascent potential competitor will be individually touched as an example, the 'killer acquisition' should be understood as an umbrella term for both, referring to an acquisition "*of a nascent firm, the competitive significance of whose products or services might be highly speculative*."[103]

## 3.2 Killer acquisitions – where is the harm?

Based on the previous observations, it is necessary to investigate whether there exists a measurable harm to tackle. Due to their nature, targets in killer acquisitions have a low turnover and for this

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[99] Ezrielev J, 'An Economic Framework for Assessment of Innovation Effects of Nascent Competitor Acquisitions' (2021), p. 2-3; OECD, 'Start-Ups, Killer Acquisitions and Merger Control – Note by the European Union', DAF/COMP/WD(2020)20 p. 3

[100] ibid p. 10

[101] OECD, 'Start-Ups, Killer Acquisitions and Merger Control – Note by the European Union', DAF/COMP/WD(2020)20. p. 9

[102] Alexiadis P and Bobowiec Z, 'EU Merger Review of "Killer Acquisitions" in Digital Markets - Threshold Issues Governing Jurisdictional and Substantive Standards of Review' [2020] 16(2) Indian Journal of Law and Technology p. 70

[103] Ibid

reason are rarely reviewed by the competition authorities. For this reason, the research on the topic is hard and the amount of research on their prevalence is minimal, especially in the digital sector. The Furman report stated that there have been no false positives – mergers prevented based on wrong assumption – because all nascent acquisitions have been permitted until now.[104] Some have even argued that the worry is purely theoretical.[105] However, it bears to keep in mind that it does not need to be target company whose innovation product is discontinued: it is typical for the incumbent, at least GAFAM-companies, to continuously adjust in terms of 'buy vs build' -mentality when expanding into adjacent fields, integrating the target's assets into its own ecosystem if given a chance. As a result, its own innovation product is extinguished under reserve killer acquisition theory of harm:[106] it is suggested that the acquisitions by GAFAM-companies are a substitute for their own research and development efforts.[107]

There are a few interesting studies that shed light on the question of the occurrence. The Commission researched whether EU merger control was capable of capturing high value-to-turnover ratio mergers by investigating 3500 transactions recorded by Bloomberg from 2015 to 2019 that were above EUR 1 billion. Many of these had not fallen under the scope of the EU Merger Regulation.[108] While it did not observe that digital transactions were reviewed less than other sectors (thus indicating there was not a sector specific enforcement gap) it was found that out of the cases which might have potentially merited review under the EU Merger Regulation, the

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[104] Furman, J., Coyle, D., Fletcher, A., McAuley, D. and Marsden, P., ¨'Unlocking Digital Competition. Report of the Digital Competition Expert Panel', (2019) HM Treasury Publications, London, p. 91, "*to date, there have been no false positives in mergers involving the major digital platforms, for the simple reason that all of them have been permitted*."
[105] ibid p. 91
[106] Caffarra, C., Crawford, G. and Valletti, T., How Tech Rolls: Potential Competition and 'Reverse' Killer Acquisitions, VoxEU, CEPR, 2020. <https://voxeu.org/content/how-tech-rolls-potential-competition-and-reverse-killer-acquisitions> accessed 25 May 2022
[107] Gautier A and Lamesch G "Mergers in the Digital Economy," (2020) Working Paper.
Kamepalli S, Rajan R and Zingales L, 'Kill zone', NBER working paper 27146 (2020), p. 3-4
[108] Commission, 'COMMISSION STAFF WORKING DOCUMENT EVALUATION of procedural and jurisdictional aspects of EU merger control {SEC(2021) 156 final}' SWD(2021) 67 final 31 para 99-100

transactions in the digital sector constituted either 10 out of the 27 (if a multiple 10 was used) or 21 out of the 90 (if a multiple 5 was used).[109] This indicates that there exist only a small amount of suspicious acquisitions which match the characteristics of the killer acquisition theory of harm. However, the phenomenon can be significantly broader. As stated before, GAFAM-companies have committed a number of acquisitions during last 10-year period.[110] An overwhelming amount of them[111] were young start-ups with less than 10 years of lifespan according to research done by the FTC in the US[112]. These have been rarely inspected by the Commission as they stay safely under the thresholds - between 2015-2019, there were six transactions above EUR 1 billion by the GAFAM companies, out of which only two were inspected by the Commission.[113] On the likelihood of uninspected acquisitions occurring under the thresholds including a number of killer acquisitions, the Commission commented that the studies done in the US indicate that possibility. They have established that as the probability of detection falls, the likelihood for anticompetitive mergers rises[114], and killer acquisitions occur usually just below the thresholds. [115] Together these studies provide support for the view that a similar phenomenon could be occurring with the high-value-to-turnover ratio transactions (basically representing acquisition of a start-up)[116] taking

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[109] Ibid

[110] Cabral, L., 'Merger Policy in Digital Industries, Information Economics and Policy', [2020]. Working Paper. New York University and CEPR 01/21.

[111] Carlson J, The Platform Competition and Opportunity Act Is a Solution in Search of a Problem (2022).

[112] Federal Trade Commission (FTC), 'Non-HSR Reported Acquisitions by Select Technology Platforms, 2010-2019: An FTC Study', (Washington: FTC, 2021) <https://www.ftc.gov/system/files/documents/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study/p201201technologyplatformstudy2021.pdf> accessed 25 May 2022 p. 36

[113] Commission, 'COMMISSION STAFF WORKING DOCUMENT EVALUATION of procedural and jurisdictional aspects of EU merger control {SEC(2021) 156 final}' SWD(2021) 67 final para 111-112 p. 25

[114] Wollmann, T G., 'Stealth Consolidation: Evidence from an Amendment to the Hart-Scott-Rodino Act (AER: Insights' (2019), 1(1): 77–94

[115] Cunningham C and others, 'Killer Acquisitions' [2021] 129(3) Journal of Political Economy <https://papers.ssrn.com/abstract=3241707> accessed 25 May 2022

[116] Commission, 'COMMISSION STAFF WORKING DOCUMENT EVALUATION of procedural and jurisdictional aspects of EU merger control {SEC(2021) 156 final}' SWD(2021) 67 final, p. 32: "*The Commission services analysed specifically transactions with a high ratio between transaction value and turnover of the target (which could be considered as typical examples of acquisitions of start-ups or nascent competitors). These constitute a small proportion of all high-value transactions, with real estate and REITS135 deals accounting for the largest part. For the purposes of the exercise, the Commission services considered transactions with a value-to-turnover ratio above 10 or 5. Although the turnover data were not available for all transactions above EUR 1 billion recorded in the Bloomberg database, the*

place.[117] It is not necessarily for them to be killer acquisitions as defined in the pharmaceutical sector: for example, in a study which examined 175 acquisitions by GAFAM-companies, out of which 105 resulted the acquired product being discontinued within a year. When looked more carefully, this proved to be a little bit misleading: the products themselves were integrated into acquirer's system, only the brand was 'killed'[118]. This seem to be the case with most GAFAM-acquisitions.[119] Despite of not being considered killer acquisition under the classical definition, the result of these is still a loss of competition, depriving the consumers from alternatives and innovation.

The best concentrated studies on the harmful effects are from the 'kill zone' phenomenon. This describes a situation where the start-ups are hesitating to enter the market due the effects caused by anticompetitive practices by an established company, such as purchasing potential competitors out of the market. According to the kill zone theory, this prevents the start-ups from generating the necessary funding because the prospect of an acquisition by an established company "*undermines its early adoption by consumers*."[120] This drives potential investors away and as a result disincentives the entry of a new competitor into the market. For example, it has been studied that the software acquisitions by Google and Facebook caused a decrease of the investment in start-ups three years following it, suggesting that this is more than a theoretical possibility.[121] This has been

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*research showed that from 2015 to 2018, transactions with a ratio of above 10 constituted between 9% and 14% of the high-value transactions, whereas transactions with a ratio above 5 represented between 23% and 28% of the high-value transactions. The year 2019 appears to be an exception in that respect136, with a much lower proportion of high-ratio transactions (only 4% above 10 and 8% above 5)".*

[117] Commission, 'COMMISSION STAFF WORKING DOCUMENT EVALUATION of procedural and jurisdictional aspects of EU merger control {SEC(2021) 156 final}' SWD(2021) 67 final p. 35, para 110

[118] Gautier A and Lamesch G(2020). "Mergers in the Digital Economy," Working Paper; Kamepalli S, Rajan R and Zingales L, 'Kill zone', NBER working paper 27146 (2020)

[119] Latham O, Tecu Isabel, Bagaria Nitika 'Beyond Killer Acquisitions: Are There More Common Potential Competition Issues In Tech Deals And How Can These be Assessed?' [2020] CPI Antitrust Chronicle p. 12

[120] Kamepalli S, Rajan R and Zingales L, 'Kill zone', NBER working paper 27146 (2020). p. 1

[121] ibid. p. 4-5

replicated in different scenarios by other authors as well.[122] In the context of mobile apps, it was found that the mere threat of Google's entry reduced the innovation rate for the entry of completely new apps.[123] Notably, the digital market also enables other unfair tactics which can disincentives investors from funding start-ups. For example, the platform – such as Amazon – can use the data it receives from the competitors using its services to produce similar, low-cost copies while guiding consumers away from the original, making it impossible for the start-up to compete against it.[124] At the same time, a recent study suggests that GAFAM-companies, while expanding on the adjacent and unrelated markets away from their core businesses, do not deter entry by competitors despite their position as a large incumbent[125]. If anything, the study suggests that there has been an increase of competition within GAFAM and other top acquirer groups[126], which traditionally would indicate more innovation and thus benefits for consumer welfare.

## 3.3 What is level of action that killer acquisitions merit?

A couple of conclusions that can be drawn from this material are: first, despite the small number of reviewed cases and a lack of definite research on the topic, killer acquisitions can be considered a concentrated threat that affects the digital sector to some empirical extent. Secondly, GAFAM-companies are in the best position to take advance of this possibility. Not only they are already acquiring considerable numbers of start-ups occurring under the EUMR thresholds – which is not necessarily illegal per se but serves as an indication that they are purposely avoiding exceeding

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[122] Koski H, Kessi O and Braeseman F, 'Killers on the road to start-ups, ETLA working paper', (2020) <https://www.etla.fi/wp-content/uploads/ETLA-Working-Papers-81.pdf > accessed 25 May 2022
[123] Wen W and Zhu F, 'Threat of platform-owner entry and complementor responses: Evidence from the mobile app market', (2019) Strategic Management Journal, Vol. 40, No 9, p. 1336-1367
[124] OECD, 'Start-Ups, Killer Acquisitions and Merger Control – Note by the European Union', DAF/COMP/WD(2020)20, p. 27
[125] Zhe J G, Leccesse M and Wagman L, 'How Do Top Acquirers Compare in Technology Mergers? New Evidence From An S&P Taxonomy' (2022) NBER working paper 29642 p. 38
[126] ibid, p. 39

them – they also are the direct beneficiaries of the present paradigm. This is because GAFAM-companies hold a dominant position in the digital sector as well-established online platforms with privileged access to data[127] and their market power would potentially decrease from the disruptive competition that competing products would bring. While the Facebook/WhatsApp case demonstrates a level of intentionality, this may be a byproduct of reasonable growth-strategies as well. Even with the traditional killer acquisition scenario, the acquirer's intent may have been to continue development of the target's innovation project, but the product had to be discontinued because financial realities or market demand did not allow its further development. However, whatever the motive, the outcome seems to be strengthening of the incumbent's position, decrease in the entry of new firms, and with these a measurable distortion of the innovation rate to the detriment of consumer welfare.[128] Even if the studies that disagree with these results prove to be accurate, the legal aspects do not change. GAFAM-companies have the ability and every incentive to use their position as a platform owner in their advance, which would potentially entail employing killer acquisitions either as a defensive or growth-strategy. If nothing else, the legislators should take measures against these actors to prevent potential future abuse and detriment of consumer welfare.

Based on this, what is level of action that these killer acquisitions in the digital sector merit? Does it warrant EU-wide legislation to address it? Or should it be left for the Member States to choose how to regulate this phenomenon, if at all? If the areas do not fall under the EU's exclusive jurisdiction, the Union can act only if the proposed action cannot be achieved sufficiently by the Member States.

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[127] Crémer J, de Montjoye Y A and Schweitzer H, 'Competition policy for the Digital 15 Era' (2019) p. 49
[128] Bryan, Kevin & Hovenkamp, Erik, "Antitrust Limits on Startup Acquisitions" (2019). <https://ssrn.com/abstract=3350064> accessed 25 May 2022,
Cabral, L M B, 'Standing on the Shoulders of Dwarfs: Dominant Firms and Innovation Incentives' (2018), CEPR Discussion Paper No. DP13115 <https://ssrn.com/abstract=3235598> accessed 8 May 2022

This is known as the principle of subsidiary.[129] While acquisitions by GAFAM-companies are likely to be cross-border in nature, it remains questionable whether the severity of these suspected cases warrants taking action at Union level. This is because the empirical research by the Commission indicates that even at the best-case scenario, killer acquisitions in the digital sector constitute a small proportion – maximum 23% - of the potentially worrying acquisitions avoiding detection under EU merger control. It should be further noted that these were only a small sliver of likewise tiny number of problematic cases found by the Commission's research.[130] This indicates that the EU Merger Regulation is working acceptably well, and no further EU-wide action is warranted considering the limited extent of the problem. This seems to be the opinion of many stakeholders as well, which by and large report being satisfied with the current state of EU merger control[131], though at the same time there exist those who specify the digital sector as a potential area where the EU Merger Regulation fails to capture harmful cross-border transactions.[132] However, as previously demonstrated, other studies seem to counteract the result of this research: at least they indicate that the data sample used by the Commission is not representative of the phenomenon.[133] It is also possible that the Commission did not qualify 'tech acquisitions' as something which might have potentially merited review. Moreover, this phenomenon has come to the competition authorities' attention very recently: it is highly possible that they have merely missed many obvious

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[129] Article 5(3) of the Treaty on European Union (TEU) and Protocol (No 2) on the application of the principles of subsidiarity and proportionality. "*Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level*."

[130] Commission, 'COMMISSION STAFF WORKING DOCUMENT EVALUATION of procedural and jurisdictional aspects of EU merger control {SEC(2021) 156 final}' SWD(2021) 67 final p. 34, paragraph 107. The Commission services also specifically considered the category of high value-to-turnover ratio transactions recorded by Bloomberg from 2015-2019, finding 45 potential transactions which met the criteria. Out of these, 27 would have potentially merited review under the EU Merger Regulation, and out of those, 10 were transaction in the digital sector.

[131] Staff working paper (SEC (2009) 808 final/2), paragraph 28.

[132] Commission, 'COMMISSION STAFF WORKING DOCUMENT EVALUATION of procedural and jurisdictional aspects of EU merger control {SEC(2021) 156 final}' SWD(2021) 67 final p. 25 paragraph 88

[133] Commission, 'COMMISSION STAFF WORKING DOCUMENT EVALUATION of procedural and jurisdictional aspects of EU merger control {SEC(2021) 156 final}' SWD(2021) 67 final p. 33 They admit using only Bloomberg's publicity available data: it is thus possible, maybe even likely, that it does not account for mass amount of unreported transactions.

cases. Without going deeper into the sampling methods, it should be noted that there seem to be enough previous research which establish a potential kill zone effect as a cause of worry. Despite the limited occurrence as reported by Commission's research, the acquisitions by GAFAM-companies – even if not exclusively killer acquisitions – have had detrimental effect on the competitive process.[134] Based on that, it can be concluded that action at Union level is warranted.

What about the suitability of any EU-wide action? The digital sector as such and GAFAM-companies are cross-border in nature – almost 24% of total online trade in Europe is cross-border – with immerse potential for future growth, especially after the digital transition forced by the Covid-crisis.[135] The digital economy's share reached between 4.5%-15.5% of global GDP in 2019, and the role of GAFAM-companies and other big online platforms is increasing: the top seven of them accounted for 69% of the total EUR 6 trillion valuation of the platform economy[136]. This indicates that the initial numbers found by the Commission's research are likely to be larger in the future. Considering that those kill zone effects are cross-border in nature as are GAFAM-companies that are primarily suspected of producing them, it seems a suitable approach to take EU-wide action instead of separate legislative steps in each Member State. For these reasons, this paper considers the principle of subsidiary to be fulfilled.

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[134] Koski H, Kessi O and Braeseman F, 'Killers on the road to start-ups, ETLA working paper', (2020) < https://www.etla.fi/wp-content/uploads/ETLA-Working-Papers-81.pdf > accessed 25 May 2022
Kamepalli S, Rajan R and Zingales L, 'Kill zone', NBER working paper 27146 (2020) < https://www.nber.org/system/files/working_papers/w27146/w27146.pdf> accessed 25 May 2022
[135] Commission, 'Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on contestable and fair markets in the digital (Digital Markets Act)' COM/2020/842 final
[136] Commission, 'COMMISSION STAFF WORKING DOCUMENT EVALUATION of the Commission Notice on the definition of relevant market for the purposes of Community competition law of 9 December 1997 {SEC(2021) 295 final}' SWD(2021) 200 final p. 13

## 3.4 Amending the EU Merger Regulation

It has been established that there are adequate legal justifications for EU-wide action. There are plenty of suggestions on how to tackle killer acquisitions, most either proposing amending the EU Merger Regulation and establishing a new threshold test, such as basing it on the value of the transaction instead of the turnover.[137] There are also other proposals, such as the reverse burden of proof test.[138] However, most of these are only interesting theories without empirical evidence to back them up. For these reasons, while lightly touching upon these topics, this chapter is going to address only proposals that can be analyzed based on the previous practical application by some authority or country. This provides some reference on whether it would be helpful to implement them at EU-wide level. As previously mentioned, the current turnover-based thresholds have had trouble in capturing suspected killer acquisitions that usually occur below them. Does this warrant an amendment of the EU Merger Regulation? Or is a less intrusive approach more suitable? This paper answer these question by analysing policy proposals in light of the principle of proportionality.

### 3.4.1 Lowering the turnover thresholds

Some critics have argued that the current legal standards should be modified either as a whole by lowering turnover thresholds or specifically in respect to transactions occurring in the digital sector

[137] Crémer J, de Montjoye Y A and Schweitzer H, 'Competition policy for the Digital 15 Era' (2019). p. 113-114
[138] Stigler Committee, 'Stigler Committee on Digital Platforms: Final Report' (The University of Chicago Booth School of Business 2019), p. 98: Stigler report proposed reverse burden of proof. It would obligate the acquirer to prove that the effects of the transactions are pro-competitive. This seems vastly disproportionate considering the extent of the problem and lacks data which could be used in the EU context. Thus, will not be considered separately.

due to the uneven nature of market developments.[139] The latter seems disproportionate considering the current data. It has been found that EU merger control has fulfilled its aim relatively well.[140] While it was seen that turnover thresholds were possibly failing to capture harmful cross-border transactions in the digital sector, it alone does not warrant lowering the turnover thresholds as a whole. This would substantially increase the number of captured mergers which would need to be inspected by the Commission, causing economic strain not only for the authorities but businesses as well.[141] Using Prof. Grainne de Burca's three-part proportionality test[142], while the measure could be suitable to achieve a legitimate aim – going through more mergers is surely going to increase the acquisitions genuinely meriting merger review as well – it does have an excessive effect while ignoring any less restrictive options on the table, such as Article 102 TFEU. Even its suitability is questionable – GAFAM-companies could simply adjust and start acquisition process under the new thresholds. For this reason, the three-part proportionality test is not fulfilled and amending the EU Merger Regulation by lowering of the thresholds is not an appropriate course of action under Article 5(4) of the TEU. [143]

### 3.4.2 Transactional value-based thresholds

While killer acquisitions can be recognized as a real phenomenon, they should be addressed in a more targeted manner. This is because EU merger control still retains a large degree of confidence

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[139] Alexiadis P and Bobowiec Z, 'EU Merger Review of "Killer Acquisitions" in Digital Markets - Threshold Issues Governing Jurisdictional and Substantive Standards of Review' [2020] 16(2) Indian Journal of Law and Technology p. 65

[140] Commission, 'COMMISSION STAFF WORKING DOCUMENT EVALUATION of procedural and jurisdictional aspects of EU merger control {SEC(2021) 156 final}' SWD(2021) 67 final p. 27

[141] OECD 'Start-Ups, Killer Acquisitions and Merger Control – Note by European Union'. DAF/COMP/WD(2020)20, 2020. p. 43

[142] Craig P and de Burca G, 'EU Law: Text, Cases and Materials' (7th edn, OUP 2015) pages 204, 205 1 is the measure suitable to achieve a legitimate aim, 2) is the measure necessary to achieve that aim or are less restrictive means available, and 3) does the measure have an excessive effect on the applicant's interests.

[143] Article 5(4) of the TEU, "*the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties"*

as a whole[144] and for this reason most proposals amending the EU Merger Regulation are unlikely to pass the proportionality test – "*do not break it if it is not broken*." However, *transactional value-based thresholds* circumvent this by adding an additional layer over the existing thresholds without changing the substance of turnover thresholds. Notably, Germany and Austria adopted this approach in 2017 on a national level.[145] It would do as its name suggests and target mergers based on their transaction value. These new thresholds aim to include digital start-ups with high innovative properties but low turnover by concentrating on the 'real' value that the acquirer offers for the transaction.[146] This has some potentially beneficial aspects. First, it could be used to tackle killer acquisitions in other sectors as well, giving it a broad range of usage that could enhance merger control at large. Secondly, it would not modify the existing well-functioning merger control system but supplement it. For these reasons, it does not exceed what is necessary and fulfils the second part of Prof. Grainne de Burca's three-part proportionality test.[147] Empirical evidence produced from Germany and Austria have shown that the additionally captured amount of transactions is not significant, especially in the digital sector.[148] While the Crémer report speculated the costs would likely create an additional administrative burden, the OECD notes that this small amount indicates these fears were unfounded.[149] As the effect is not extensive for applicants either, it could be seen to fulfil the third part of Prof. Grainne de Burca's three-part proportionality test as

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[144] Staff working paper (SEC (2009) 808 final/2), paragraph 28.
[145] Commission, 'COMMISSION STAFF WORKING DOCUMENT EVALUATION of procedural and jurisdictional aspects of EU merger control {SEC(2021) 156 final}' SWD(2021) 67 final 40, paragraph 122-124
[146] Crémer J, de Montjoye Y A and Schweitzer H, 'Competition policy for the Digital 15 Era' (2019) p. 113-114
[147] Craig P and de Burca G, 'EU Law: Text, Cases and Materials' (7th edn, OUP 2015) p. 204,-205 2) is whether the measure necessary to achieve that aim or are less restrictive means available
[148] Commission, 'COMMISSION STAFF WORKING DOCUMENT EVALUATION of procedural and jurisdictional aspects of EU merger control {SEC(2021) 156 final}' SWD(2021) 67 final pages 40-41 paragraph 124-125. "*Between 2017 to 2020 in Germany, 28 notifications were made on this basis. Of these, 19 cases were cleared 9 cases were withdrawn after the German NCA's confirmation that there was no notification obligation. 4 notifications were filed by digital companies… Austria, between November 2017 and the end of the year 2020, 53 notifications160 were made on the basis of the new thresholds (out of about 500 notifications on a yearly basis). 5 notifications concerned the digital sector*"
[149] Start-Ups, Killer Acquisitions and Merger Control – Note by European Union. DAF/COMP/WD(2020)20, 2020. p. 45

well.[150] However, its small amount also indicates that it is not suitable for the task. The OECD paper argues that it still benefits the overall consumer welfare while discouraging firms from 'gaming' the turnover thresholds.[151] While this may be true, it does not currently pass the first part of Prof. Grainne de Burca's three-part the proportionality test[152] as is has not been demonstrated that the transactional based thresholds have produced any noteworthy results regarding the killer acquisition phenomenon. OECD's argument that it *may* have prevented companies from employing killer acquisitions is not enough to justify EU-wide amendment. Thus, it is not a suitable approach for EU merger control to adopt regarding occurrence of killer acquisitions in the digital sector.

### 3.4.3 Ex post merger control

Currently, EU merger control is a predictive exercise with its ex ante approach while both killer and nascent acquisitions are apparent usually at a later stage. For example, it took six years for the anticompetitive effects of Facebook/Whatsapp merger to emerge.[153] Unless there are existing inside documents or similar evidence which could be used to establish the intent, it is hard to prove the killer acquisition as a definite strategy. For this reason, the competition authorities usually need to base their judgement on a model about the future impact of the acquisition.[154] Noteworthily Hungary, Ireland, Sweden, Lithuania, the UK, and the US all have ex-post review powers to various extents.[155] However, an ex post approach warrants attention to some disadvantages. Ex-post

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[150] Craig P and de Burca G, 'EU Law: Text, Cases and Materials' (7th edn, OUP 2015) p. 204-205 2 is the measure necessary to achieve that aim or are less restrictive means available
[151] OECD, Background note on OECD, 'Start-Ups, Killer Acquisitions and Merger Control – Note by the European Union', DAF/COMP/WD(2020) p. 45
[152] Craig P and de Burca G, 'EU Law: Text, Cases and Materials' (7th edn, OUP 2015) p. 204-205 3 does the measure have an excessive effect on the applicant's interests.
[153] Crémer J, de Montjoye Y A and Schweitzer H, 'Competition policy for the Digital 15 Era' (2019) p. 119
[154] Smejkal V, 'Concentrations in Digital Sector - A New EU Antitrust Standard for "Killer Acquisitions" Needed?' [2020] 7(2) Journal for International and European Law p. 7-8
[155] Start-Ups, Killer Acquisitions and Merger Control – Note by European Union'. DAF/COMP/WD(2020)20, 2020, p. 47

investigation similar to one in the US[156] is certainly going to cause legal uncertainty.[157] It would enable the Commission to start an investigation on the merger after it has occurred indefinitely, which would require the parties to invest additional resources to this possibility and leave the future of the merger uncertain after the transaction has occurred. It is still relevant to keep in mind that this type of approach is not unique and less extreme measures are possible. The UK has a possibility to investigate the merger 6 months after the transaction, while for Sweden it is two years regarding certain types of mergers[158]. Additionally, French authorities have noted that companies are already functioning under the legal uncertainty caused by Article 101 and Article 102 of the TFEU, indicating that companies are able to tolerate it.[159] Certain scholars have proposed that the Norwegian system could be used as a model: based on it, only a limited number of large players would be targeted. Ex post merger control would include a possibility to revoke merger only within a certain time limit.[160] If it was proposed as a separate regulatory act, there would be no need to necessarily amend the substance of EU Merger Regulation itself. Out of all presented options, this has most merit. This is because if targeted correctly, ex post control would concern GAFAM-companies without increasing the administrative burden for other businesses.

The measure is arguably suitable to address the challenge posed by killer acquisitions as there is no need to rely on speculative predictions. Thus, the first part of three-part proportionality test is

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[156] ibid: In the US, there is no statutory time limit.
[157] Case C-63/93. 5 February 1996 <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61993CJ0063:en:HTML> accessed 25 May 2022. It is ruled that the legal rules must be clear and precise while aiming to ensure that "*situations and legal relations governed by Union law remain foreseeable"*
[158] OECD, 'Start-Ups, Killer Acquisitions and Merger Control – Note by Sweden, DAF/COMP/WD(2020) p. 6
[159] Smejkal V, 'Concentrations in Digital Sector - A New EU Antitrust Standard for "Killer Acquisitions" Needed?' [2020] 7(2) Journal for International and European Law p. 8
[160] ibid: Norwegian system includes 'a list' of certain companies which are obligated to report their acquisitions to the authorities. French proposal was modification of this.

fulfilled[161]. However, it is not necessary[162]: this is because while with a slight difference regarding the practical application[163], Article 102 of the TFEU can fulfil the same ex post function. While Article 102 is a similar cause of uncertainty as ex post merger control would be, it is an already existing one with an established procedure. Considering the extent of harm posed by killer acquisitions as a phenomenon, there does not exist enough empirical evidence to justify amendment which increases legal uncertainty. There are also other counterpoints: first, the internal market is protected by the principle of an open market economy with free competition[164] and the freedom to conduct business.[165] Placing a specific group of businesses under additional obligations based on speculative risk can be argued to be overreacting. In practice, the Commission would be singling-out problematic actors with a separate legislative act when otherwise unable to investigate them under the common rules. It certainly infringes the traditional view on free competition that it is supposed to protect. The counterpoint to this would be that this is necessary to enable free competition: GAFAM-companies have both the resources and incentive to abuse their positions as the owners of the online platforms in the digital sector while the current legal toolset leaves competition authorities unable to act. However, it could have an extensive effect on GAFAM-companies by placing them under heavy administrative burden while less restrictive measures are available. It should be reminded that many of the acquisitions create beneficial efficiencies and synergies for the consumers, and only harmful ones should be prevented. For this reason, it does not pass Prof. Grainne de Burca's second or third part of three-part proportionality test[166] and thus the proportionality requirement is not fulfilled.

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[161] Craig P and de Burca G, 'EU Law: Text, Cases and Materials' (7th edn, OUP 2015) p. 204.205 1) is the measure suitable to achieve a legitimate aim, and 3) does the measure have an excessive effect on the applicant's interests.
[162] ibid, p. 204-205: 2) is the measure necessary to achieve that aim or are less restrictive means available
[163] This is because merger control uses SIEC-test, while 102 uses dominance-test.
[164] Article 119 TFEU (1)
[165] EU Charter of the Fundamental Rights**,** Article 14
[166] Craig P and de Burca G, 'EU Law: Text, Cases and Materials' (7th edn, OUP 2015) p. 204-205: 2) is whether the measure necessary to achieve that aim or are less restrictive means available

Based on this outcome, this paper will no longer consider amendments to the EU Merger Regulation as a potential option. However, it does not mean that the killer acquisition theory of harm does not warrant further action. There is enough evidence to establish acquisitions by GAFAM-companies as a potential detriment for the competitive process.

## 3.5 Summary

The purpose of this Section was to establish the extent of harm caused by the killer acquisitions, the level of action this harm merits, against who the action should be targeted and in what manner. Based on the various studies on the subject, this paper narrowed the problem down to a very limited number of acquisitions happening under the turnover thresholds. Some of them could potentially be categorized as killer acquisitions. It was also established that the main suspects of this practice are GAFAM-companies. With this as a background, the paper compared some of the more popular suggestions from the experts and the Commission against the Union's general principles. It was found that generally these measures would be extensive and fall short of passing the proportionality test. EU merger control has reportedly functioned relatively well and there are less intrusive means available. This paper suggested Article 102 of the TFEU as a more proportionate alternative, which will be addressed in Section 4. Thus, based on the research by the Commission and analysis of its legal implications, the level of occurrence of killer acquisitions does not seem to warrant a far-reaching amendment to the EU Merger Regulation itself. Yet this does not mean completely disregarding the killer acquisition theory of harm as a potential threat.

# 4. Case for Article 102 of the TFEU: is it suitable tool to address killer acquisitions?

As was previously alluded to, there is nothing in practice preventing the Commission from using Article 102 to capture suspected killer acquisitions, though it is necessarily going to occur ex post. Its role included investigating problematic mergers before the EU Merger Regulation was enacted, most famously in the Continental Can case[167]. This paper proposes that based on that, it is possible to establish a similar line of argumentation which can be applied to killer acquisition as well. Keeping considerations of the previous Section in mind, this can be both a more suitable and less intrusive approach compared to alternatives. Article 102 has been criticized as a time-consuming process which can be used only after the damage has been done.[168] Yet it seems appropriate for these circumstances for the following reasons: 1) it can take even up to six years to determine the harm to competition, as seen with the Facebook/Whatsapp case, 2) there is no need for turnover threshold requirements when establishing an abuse of dominance, 3) killer acquisitions can be easily mixed with beneficial tech acquisitions: this warrants an effect-based ex post procedure to separate these to prevent false positives.

[167] Case 6/72 Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities [1973] ECR 215

[168] Commission, 'COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT REPORT Accompanying the document Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on contestable and fair markets in the digital sector (Digital Markets Act) {COM(2020) 842 final} - {SEC(2020) 437 final}' SWD(2020) 364 final, paragraph 119

## 4.1 Article 102 of the TFEU

As a legal tool Article 102 is used to tackle abusive conduct by a dominant firm within the internal market, such as limiting production, markets or technical development to the prejudice of consumers or directly or indirectly imposing unfair trading conditions.[169] Its key objectives is to ensure "*competition, efficiency and consumer welfare*."[170] Article 102 can only be applied "*where there is already a dominant position - that is to say substantial market power*" [171] in addition to requiring an effect on trade between Member States[172]. It has been limited by Guidance on Article 102 Enforcement Priorities, which lays out detailed rules on its application and different anti-competitive abuses.[173] According to it, dominant companies have a special responsibility not to allow their conduct to impair genuine undistorted competition.[174] The Commission does its assessment on this by concentrating on the protection of an effective competitive process itself and not simply the competitors[175], "*taking into account the specific facts and circumstances of each case.*"[176] Its first step is to define the market and examine whether the company is in a dominant position and what is its market power.

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[169] Article 102 of the TFEU(a)(b),(c),(d)
[170] Whish R and Bailey D, Competition Law (7th edn, OUP 2012) p. 197
[171] ibid, p. 178-180. According to Whish, "*Paragraph 65 of the Court's judgment in United Brands can be understood to equate dominance with substantial market power*."
[172] Article 102 of the TFEU
[173] Whish R and Bailey D, Competition Law (7th edn, OUP 2012) p. 175: It should be noted that Richard emphasizes that it is not strictly a set of guidelines on the law of Article 102: it only provides insight to the Commission's enforcement priorities. Basically, this means that the jurisprudence of the EU Courts is only legitimate source of law.
[174] Commission, 'Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertaking' 2009/C 45/02, paragraph 1 and Case 322/81 [1983] ECR 3461, [1985] 1 CMLR 282 paragraph 57.
[175] ibid, paragraph 6. It further states that "*this may well mean that competitors who deliver less to consumers in terms of price, choice, quality and innovation will leave the market*", giving a nod to sentiment that '*the most effective competitors wins*'.
[176] ibid, p. 8.

A dominant firm has been defined by the case-law to be in a position of dominance when it "*enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers*."[177] This will be assessed while considering factors such as the market position of the undertaking and its actual competitors, expansion and entry by potential competitors, and countervailing buyer power.[178] The market shares are the first indication about the market structure, but it is noteworthy that they are interpreted while taking into consideration the relevant market conditions.[179] When it comes to market power, it is deemed substantial if a dominant firm can increase profitably prices above the competitive level for a significant period of time.[180]

### 4.1.1 Challenges with the establishment of a dominant position

There are some technical considerations which warrant more close inspection. The stakeholders and the Commission have stated that 102 TFEU could not be sufficiently employed to tackle challenges posed GAFAM-companies and other online platforms. This is because dominance may be hard to establish.[181] As with the EU Merger Regulation, an Article 102 investigation starts with market definition. In Section 2.3.-2.4. established challenges regarding the rapidly evolving, dynamic digital market will apply here as well, which may make it difficult to define relevant market. For example, it can be challenging to assess whether products could be each other's substitutes in near

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[177] ibid, paragraph 10
Also, see Case 27/76 *United Brands Company and United Brands Continentaal* v *Commission* [1978] ECR 207, paragraph 65, and Case 85/76 *Hoffmann-La Roche & Co.* v *Commission* [1979] ECR 461, paragraph 38
[178] Commission, 'Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertaking' 2009/C 45/02, paragraph 12
[179] ibid, paragraph 13
[180] ibid, paragraph 11
[181] Commission, 'Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on contestable and fair markets in the digital sector (Digital Markets Act) {COM(2020) 842 final' SEC(2020) 437 final & SWD(2020) 364 final, paragraph 119

future. However, as demonstrated with the Google/Android case, a SSNDQ- test could be used to define the market instead of a SSNIP-test[182]. It is an interesting point of speculation whether this could be used to estimate effects of a killer acquisition in a suspected case: however, for the purposes of this paper it is enough to understand that it is possible to define the market even in the digital sector. This is because when the market has been defined, the dominance can be established as well. The market shares give a first indication of this, with the amount over 50% establishing the grounds for the presumption[183], though it should be noted that the market can be established on a very narrow area as well. For this reason, the pure size of a company does not necessarily tell anything about its status on a specific market.

Here, the main challenge is that the market power of GAFAM-companies is not necessarily reflected in market shares.[184] For example, Amazon may have competing products with a start-up that uses its platform. However, Amazon has an ability to downrank this start-up while up ranking its own, similar products. [185] At the same time the start-up cannot exit Amazon's platform as it would lose an access to a vast number of potential customers.[186] In the killer acquisition scenario, this start-up could accept an acquisition offer from Amazon because it does not have any other practical option. According to the kill zone theory, it would be unlikely to get the necessary funding independently as the investors would be avoiding it.[187] However, as demonstrated by the Virgin/British Airways case, it is possible to find dominance even at lower level of market shares than 50%. For example, British Airways was considerably larger compared to its rivals in the market for procurement of air travel agency services and it enjoyed a privileged position as an

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[182] Case AT.40099 Google Android Commission Decision 2019/C 402/08 [2019] OJ C402/19
[183] Whish R and Bailey D, Competition Law (7th edn, OUP 2012) p. 183
[184] Crémer J, de Montjoye Y A and Schweitzer H, 'Competition policy for the Digital 15 Era' (2019) p. 49
[185] OECD, 'Start-Ups, Killer Acquisitions and Merger Control – Note by European Union'. DAF/COMP/WD(2020)20, p. 27
[186] Crémer J, de Montjoye Y A and Schweitzer H, 'Competition policy for the Digital 15 Era' (2019) p. 47-48
[187] Koski H, Kessi O and Braeseman F, 'Killers on the road to start-ups, ETLA working paper', (2020) < https://www.etla.fi/wp-content/uploads/ETLA-Working-Papers-81.pdf > accessed 25 May 2022

obligatory business partner for travel agents. These were taken as an indication of British Airlines dominant position, among other things.[188] As GAFAM-companies benefit from a similar position in many digital markets, this line of argumentation could be extended to establish dominance even when lacking the market shares in a suspected killer acquisition scenario. The Crémer report proposes their access to data would be better indicator of dominance[189]. Also, as demonstrated by United Brands v Commission and Michelin II cases, the previous conduct can work as evidence to establish a dominant position as well[190]. As established in Section 3.2.-3.3., GAFAM-companies have conducted many uninspected acquisitions slightly under the turnover thresholds in the technological and digital sector. With empirical evidence establishing potential killer acquisitions among them, along with studies from the US about the matter, these could be considered among the evidence which indicate a dominant position. While individually these kinds of attributes do not necessarily suffice, having multiple of indicators stack up could provide grounds for dominance even if not meeting formal market share criterion of 50%. For the purposes of investigating suspected killer acquisitions, it could be beneficial to revert back to case-law practice before the EU Merger Regulation, where it was possible to find an abuse of dominance position with minority shareholdings.[191]

Moreover, dominance can also be established if the acquirer and target are suspected of being potential competitors in the future.[192] As evident with GAFAM-companies acquiring seemingly

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[188] Whish R and Bailey D, Competition Law (7th edn, OUP 2012) p. 183.
Case T- 219/99 British Airways plc v Commission [2003] ECR II- 5917, [2004] 4 CMLR 1008, paras 220-225
Case C- 95/04 P British Airways plc v Commission [2007] ECR I- 2331, [2007] 4 CMLR 982. British Airways had a market share 39.7%.
[189] Crémer J, de Montjoye Y A and Schweitzer H, 'Competition policy for the Digital 15 Era' (2019) p. 49
[190] Whish R and Bailey D, Competition Law (7th edn, OUP 2012) p. 186
[191] Alexiadis P and Bobowiec Z, 'EU Merger Review of "Killer Acquisitions" in Digital Markets - Threshold Issues Governing Jurisdictional and Substantive Standards of Review' [2020] 16(2) Indian Journal of Law and Technology p.86-87
[192] Whish R and Bailey D, Competition Law (7th edn, OUP 2012) p. 184.

unrelated technological products in adjacent markets[193], they could be found as a potential competitor even if not directly in competition with the target company at first glance. They may have information on how to integrate the acquired product into their ecosystem or how it could be a threat to their future expansion to justify the transaction. While the killer acquisition's practical effects are limited to overlapping products (i.e. on the same market) and are thus horizontal in nature[194], the overlap should not only be inspected from the user's perspective. The product can be a substitute in two-sided markets[195] even if not apparent at first. This heightened potential for the competitor to enter from adjacent market is described by an OECD paper as 'potential horizontal competition'[196]. It can be argued that some GAFAM-companies, such as Amazon, already have this status in the markets within their platforms. In the AKZO case, it was found that AKZO's ability to weaken or eliminate competitors was an indicator of dominance.[197] Similarly, Amazon's access to data enables it to monitor competing products, downrank them while at the same time entering into direct competition with them by producing its rival products.[198] This same data could also allow it to spot start-ups with high innovative potential for acquisition using its platform. While the dominant position would have to be determined on a case-by-case basis, there seem to be enough to enable an Article 102 investigation in a suspected killer acquisition scenario.

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[193] Zhe G J and others, 'Top Acquirers Compare in Technology Mergers? New Evidence From An S&P Taxonomy' (2022) <https://www.nber.org/papers/w29642> accessed 25 May 2022

[194] OECD, 'Start-Ups, Killer Acquisitions and Merger Control – Note by the European Union', DAF/COMP/WD(2020)20 <https://www.oecd.org/competition/start-ups-killer-acquisitions-and-merger-control.htm> accessed 20 May 2022. p. 9

[195] Basically, a situation where there exists two distinct user groups which provide each other with value: this could be users of a platform that use it for free, but at the same time produce valuable data for the company, which can sell it to advertisers.

[196] OECD, 'Start-Ups, Killer Acquisitions and Merger Control – Note by the European Union', DAF/COMP/WD(2020)20 <https://www.oecd.org/competition/start-ups-killer-acquisitions-and-merger-control.htm> accessed 20 May 2022, p. 9

[197] Whish R and Bailey D, Competition Law (7th edn, OUP 2012) p. 186

[198] OECD, Background note on OECD, 'Start-Ups, Killer Acquisitions and Merger Control – Note by the European Union', DAF/COMP/WD(2020)20 <https://www.oecd.org/competition/start-ups-killer-acquisitions-and-merger-control.htm> accessed 20 May 2022 page 3; Crémer J, de Montjoye Y A and Schweitzer H, 'Competition policy for the Digital 15 Era' (2019), p. 49

Considering all these factors is a time-consuming exercise which requires immense resources.[199] While dominance can be established, it is going to be both a challenging and expensive enterprise: however, once more, it is certainly possible.

### 4.1.2 Killer acquisition as an abuse of dominance?

After dominance has been established, it needs to be investigated whether firms' action falls under the category of abuse. Does the killer acquisition theory of harm fulfil this condition? As the list of abusive practices of Article 102 is not exhaustive[200], it does not matter that the killer acquisition as a practice is not specifically mentioned even in Guidance on the Enforcement Priorities of Article 102. It can be a cause for legal uncertainty, but as a tool it is only meant to be instructive: the only authoritative interpretation of Article 102 is found from the jurisprudence of the EU Courts.[201] In the Continental Can case, one of the counterarguments was that Article 102 could not be applied because it was only concerned with the direct exploitation of consumers, not indirect harm that could occur to the competitive process. Thus, the structural changes to the market should not be covered. However, the Court rejected this argument, establishing that Article 102 had to be interpreted in light of the spirit of the Treaty. [202] It follows that an abuse of dominance can be found when the competitive process itself is distorted, which covers the killer acquisition theory of harm as well. This means that an abuse does not necessarily require direct usage of market power: in the Continental Can case it was enough that the dominant firm strengthened its position as a result of the transaction and eliminated competition with it.[203] This same line of thinking can be extended to

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[199] Crémer J, de Montjoye Y A and Schweitzer H, 'Competition policy for the Digital 15 Era' (2019) p. 52
[200] Jones A and Sufron B, 'EU competition law: text, cases, and materials', (7th edn OUP 2019) p. 198
[201] Whish R and Bailey D, Competition Law (7th edn, OUP 2012) p. 176
[202] ibid, p. 2
[203] ibid.

the case of killer acquisitions as well.[204] The Court's case-law has ruled that while the anti-competitive effect caused by dominant firms' practice cannot be purely hypothetical, it is enough to demonstrate the practice potentially excludes competitors and restricts competition.[205] For these reasons, it can be established that killer acquisitions could constitute an abuse of dominance, at least in theory.

One could still wonder, should the Commission amend Guidance on the Enforcement Priorities of Article 102 to account for killer acquisitions to provide better legal certainty? The stakeholders have an interest in avoiding needless investigation by the competition authorities, and for this reason they need to use resources to ensure they do not break any guidelines[206]. It can be an exhaustive process for the merging parties themselves to figure out when they are engaging in the acquisition which can be perceived as a killer acquisition: as previously noted, sometimes synergies can only be created as a result of the merger, as is the case usually with tech acquisitions, yet they share many traits with killer acquisitions which may subject them to the Commission's investigation. At the same time, it can be seen how resulting short-term consumer welfare could have long-term negative implications for the competitive process if as a result the acquirer strengthens its dominant position: this seems to be one of the regrets with the Facebook/Whatsapp and Facebook/Instagram cases[207]. Formalistic approach would likely fail to separate beneficial and anti-competitive aspects and risk prohibiting tech acquisitions as well. To be able to adequately account for all these considerations,

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[204] For example, GAFAM-company, such as Google, would have both strengthened its dominant position in the market for general internet search services and killed its competition by acquiring the other general internet search service DuckDuckGo when it was launched in 2008 as a startup, and would have fulfilled the last condition of the killer acquisition theory of harm by discontinuation of that product. This would have constituted an abuse of dominant position which would have been in the detriment of the consumers.
[205] Crémer J, de Montjoye Y A and Schweitzer H, 'Competition policy for the Digital 15 Era' (2019), p. 42. Cases referred are Case C-23/14, Post Danmark II, EU:C:2015:651, at para. 66. 59 Case C-549/10 P, Tomra and Others v Commission, EU:C:2012:221, at para. 68.
[206] Commission, 'COMMISSION STAFF WORKING DOCUMENT EVALUATION of procedural and jurisdictional aspects of EU merger control {SEC(2021) 156 final}' SWD(2021) 67 final p. 84
[207] ibid, p. 15

it seems necessary to have an extensive effect-based analysis instead of more formalistic one, which as a downside entails additional administrative burden. However, the stakeholders should not be too worried about this, as it is the Commission that has the burden of proof to prove anticompetitive effects, as exemplified by Deutsche Telekom and Teliasonera[208][209]. The Commission will conduct the investigation by considering various factors such as the position of the dominant company, the competitors and the conditions of the market.[210] In a killer acquisition scenario, to be able to separate the beneficial tech acquisitions from harmful ones, this approach appears suitable. Considering dynamic, rapidly evolving digital and technological market, it does not seem that useful to codify the killer acquisition theory of harm by amending the Commission's guidelines and categorize them as per se illegal. The characteristics of killer acquisitions could change in an unpredictable manner which would necessity periodical updates to the Guidance. Further, it could incentivise competition authorities to adopt a formalistic view on the matter. For this reason, while some modifications could be useful for enhanced transparency, the Commission should be careful not to codify the killer acquisitions in an inflexible manner. Some notes could be taken from the way it handled Guidance on Article 22 Referral, which will be addressed in Section 5. In the interest of avoiding false positives which may occur if tech acquisitions are mistaken for killer acquisitions, the current case-by-case approach seems appropriate despite some level of existing legal uncertainty and immense resources the investigation requires.

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[208] Whish R and Bailey D, Competition Law (7th edn, OUP 2012) p. 200, 208
[209] Case C- 52/09 Konkurrensverket v TeliaSonera Sverige AB [2011] ECR I- 000, [2011] 4 CMLR 982, paras 65–77
[210] Whish R and Bailey D, Competition Law (7th edn, OUP 2012) p. 209

## 4.2 Is Article 102 a suitable tool for tackling killer acquisitions?

As established at the start of this Section, there are several practical reasons for why the Article 102 is a preferable alternative to address this problem despite the previously outlined challenges. First, it should be referred to previous Section, where it was established that it would be both disproportionate and a potential cause of legal uncertainty to amend the EU Merger Regulation's thresholds or introduce ex post merger control. This is especially true considering the speculative scale of the problem and the fact that Article 102 is an existing tool which can achieve the same outcome. Secondly, it is hard to establish strong evidence about killer acquisitions occurring ex ante.[211] Proving a harmful intention beforehand requires strong empirical evidence such as internal documents discussing killer acquisition as a defensive strategy or about maintaining a dominant position, an economic assessment which shows that the firm is acquiring a start-up without any other valid reason than to kill the product, a whistleblower from the company, the counterfactual (what would be situation of the market in the absence of the merger) or using the acquirer's history of similar unexplainable acquisitions of start-ups as an indication.[212] This is especially true in the rapidly evolving, dynamic markets such as the digital sector.[213] The effects are considerably easier to estimate after the merger has occurred: with the killer acquisition in its original meaning it can be investigated whether the product was discontinued or not, and with the nascent competition whether

[211] OECD, 'Start-Ups, Killer Acquisitions and Merger Control – Note by the European Union', DAF/COMP/WD(2020)20 <https://www.oecd.org/competition/start-ups-killer-acquisitions-and-merger-control.htm> accessed 25 May 2022, p. 25-26 (evidence), p. 23-24 (counterfactual)
[212] ibid
[213] Commission, 'COMMISSION STAFF WORKING DOCUMENT EVALUATION of the Commission Notice on the definition of relevant market for the purposes of Community competition law of 9 December 1997 {SEC(2021) 295 final}' SWD(2021) 200 final p. 41

the market has had anti-competitive effects, such as the strengthening of the dominant position, as a result.

Thirdly, Article 102 requires an extensive investigation to establish both dominance and the harm to competition. Despite criticism, this is warranted considering the potential beneficial effects derived from tech acquisitions. This seems an appropriate use of resources: also, the alternative suggestions such as increasing the number of mergers being reviewed under the EU Merger Regulation are bound to cause administrative burden as well. An Article 102 investigation, in comparison, is a well-established procedure which does not require fulfilment of turnover thresholds requirements.[214] The Commission can start investigation under Article 102 upon receipt of a complaint[215] and could under Article 5 Regulation 1/2003 – which supplements Article 102 TFEU's practical application - order that an infringement by GAFAM-company is to be brought to an end.[216] It can order fines as an assurance, among other things. In more extreme cases, it could be possible to use interim measures to intervene. They are designed to address cases of urgency which cause "*risk of serious and irreparable damage to competition*."[217] In other words, where a 'prima facie' infringement could be shown. While this is a high bar to pass, it can be argued that on some occasions GAFAM-companies fulfil the criteria. For example, with Google gaining an effective monopoly in ad market after Google/DoubleClick case, it could be seen that it is necessary for interim measure to prevent monopolization. Monopolies have no incentive to innovate, meaning that the present state is problematic for the competitive structure and consumer welfare. Similar argument can be extended to markets where circumstances match the kill zone theory. Of course, as

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[214] It should be noted that the killer acquisition scenario should not have problems fulfilling the technical criteria of Article 102 regarding trade. As the digital sector is by large cross-border in nature, *the transaction is going to affect the trade between Member States* with a *sufficient degree of probability*. Acquisition by GAFAM-company is likely to have *appreciable* impact as the killer acquisition would strengthen its dominant position and eliminate competition.
[215] Regulation 1/2003 Article 17-18
[216] Article 5 of Regulation 1/2003
[217] Article 8 of Regulation 1/2003

interim measures are rarely used, this would require a little more liberal usage than previous practice would entitle. However, the dynamic, evolving nature of the digital markets, and associated challenges that this nature brings, could justify this approach to prevent further consolidation of GAFAM-companies. This, of course, would limit its usage: only those killer acquisitions which have caused serious, irreparable damage can be targeted. This indicates that while 102 TFEU could be employed to tackle high profile killer acquisition cases, it could benefit being paired with some other tool to work alongside it.

With these measures, Article 102 can be used quite effectively to target those cases which have ex post provided indications of falling under the killer acquisition theory of harm. Lastly, it is important to emphasize that while it can be argued that the current mode of Article 102 application causes legal uncertainty[218], following other suggestions would be creating an additional amount of it. This should be kept in mind while comparing it to other proposals such as ex post merger control. One could try to argue that SIEC-test could be a major benefit that ex post merger control could bring to the table. However, it has been noted that the SIEC-test does not fulfil its role meaningfully well anymore because it only considers whether competition is reduced.[219] The Lear Group found that many fledgling digital actors had underwent a significant growth since post-merger, something of which could not be assessed adequately with the SIEC-test.[220] The problems with its application have been echoed by Furman report.[221]For purposes of this paper, it is enough to

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[218] As the jurisprudence of the EU Court is only way for the stakeholders to know in advance what constitutes an abuse of dominance.

[219] Alexiadis P and Bobowiec Z, 'EU Merger Review of "Killer Acquisitions" in Digital Markets - Threshold Issues Governing Jurisdictional and Substantive Standards of Review' [2020] 16(2) Indian Journal of Law and Technology, p. 89

[220] The Furman report proposed replacing it with a 'balance of harms' test, which would involve taking into account the scale of the harm and its likelihood in cases involving potential competition and harm to innovation.

[221] Furman, J., Coyle, D., Fletcher, A., McAuley, D. and Marsden, P., ¨'Unlocking Digital Competition. Report of the Digital Competition Expert Panel', (2019) HM Treasury Publications, London, p. 91, 13-14. This would be assessed by establishing counterfactual scenario which would consider all these potentially relevant factors, such as harm to innovation and potential competition issues. Though, it has been criticized for introducing disproportionate amount of

conclude based on that the SIEC-test would not bring similar benefits within the digital sector as it brought under original the EU Merger Regulation, and thus cannot be seen as a strongly preferable option compared to the dominance standard in Article 102 investigation.

Based on this, it seems more suitable under Article 5(4) of the TEU to use an existing tool which does not require any foundational changes based on a speculative risk[222]. While updating the Guidance on the Commission's Enforcement Priorities on Article 102 could be appropriate, for the purposes of this paper it is enough to conclude that the current toolset is preferable to alternatives in Section 3.

## 4.3 Other considerations

There are some academic considerations for this approach that should be addressed. First, the EU Merger Regulation was created to address an enforcement gap that Article 101 and Article 102 TFEU were unsuitable to tackle. Using both tools in parallel might undermine legal certainty generated by the adoption of the EU Merger Regulation. This is because Article 102 may be used later to tackle mergers already reviewed under the EU Merger Regulation.[223] However, the current predicament is a result of EU merger control's inability to capture suspected killer acquisitions occurring underneath its thresholds. It is mostly reliant on the referral by the national competition authorities or merging parties. Ironically, Article 102 could be used to fill this enforcement gap left

costs and its usage would require markets with objective characteristics. Otherwise, analysis under the balance of harms would not be possible.

[222] Article 5 of the TEU, "*the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties*

[223] Alexiadis P and Bobowiec Z, 'EU Merger Review of "Killer Acquisitions" in Digital Markets - Threshold Issues Governing Jurisdictional and Substantive Standards of Review' [2020] 16(2) Indian Journal of Law and Technology, p. 87

by the EU Merger Regulation by reacting to complaints from parties affected by killer acquisitions. For example, under kill zone theory, the start-up which deems market impenetrable due to the consolidation which has occurred due to strategic acquisitions by GAFAM-company, could bring these transactions up to the Commission or to their respective national competition authority.[224] Article 102 has already been used to fill enforcement gap left by the EU Merger Regulation at least on one occasion: in the Tetra Pak case, it was deemed that the merger review was not suitable to tackle the situation where monopoly status was due to the uniqueness of the technology. This meant that the monopoly status did not change post and pre-acquisition. However, it was possible to find an abuse of dominant position as it had the effect of strengthening the dominant position with anti-competitive implications for the entry of new competitors.[225]

Secondly, Article 102 is predicated upon the *abuse* of a dominant position, not the *existence* of dominant position that might lead to abusive behaviour: in other words, it is not unlawful to have a dominant position.[226] However, as the previous example demonstrated, this view is not exactly accurate. As seen with Tetra Pak case, while Tetra Pak did not engage in any traditional unfair practices, the strengthening of its dominant position as a result of technological superiority constituted an abuse. This can be seen reflected in the current position of Amazon and Facebook, both of which have with superficially non-abusive acquisitions strengthened their dominant position in their respective markets while preventing, or at least considerably delaying, the entry of a new competitor. Of course, this is a market specific exercise: however, the mere existence of Facebook's

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[224] *Notice on the handling of complaints* states that the Commission "*wishes to encourage citizens and undertakings to address themselves to the public enforcers [of competition law] to inform them about suspected infringements of the competition rules*". The digital sector could also merit a sector-specific investigation, though it is limited in its enforcement ability and cannot be used in the individual cases, making it not suitable for the purposes of this paper.
[225] Alexiadis P and Bobowiec Z, 'EU Merger Review of "Killer Acquisitions" in Digital Markets - Threshold Issues Governing Jurisdictional and Substantive Standards of Review' [2020] 16(2) Indian Journal of Law and Technology, p. 84 and Case T-51/89 Tetra Pak Rausing SA v Commission of the European Communities [1990] ECR II-41, paras 1-8
[226] ibid.

position as an online platform can result in anticompetitive effects that enable Article 102 investigation.

## 4.4 Summary

This Section established that it is theoretically possible to use Article 102 TFEU to capture killer acquisitions in the digital sector. It is possible to establish dominance for a GAFAM-company even if it would be lacking in market shares in the specific market based on previous conduct, position as a potential competitor or their strong market power derived from their unique attributes, such as being the owners of the online platforms where the trade is occurring. In accordance with the case-law, the acquisitions of start-ups by GAFAM-companies in the digital sector could also constitute an abuse of this dominant position as it would theoretically simultaneously strengthen their dominant position while eliminating potential competition. However, this warrants an effect-based analysis to separate them from beneficial tech acquisitions. In light of Union's aims as described by Article 5 of the TEU, it has been concluded that Article 102 would be a more suitable tool compared to other alternatives in Section 3 considering the current known level of threat posed by killer acquisitions in the digital sector. However, not all suspected killer acquisitions manifest characteristics which will be noted by the competition authorities, or they may take a long time to appear. Meanwhile, the competition structure must endure the anticompetitive effects. Because Article 102 TFEU is a lengthy procedure, it is going to time-consuming and expensive to utilize, and GAFAM-companies have engaged in mass number of acquisitions which could benefit from further investigation. For the practicality purposes, while it can be used as an ex post tool to tackle most high profile GAFAM-acquisitions, it may not be suitable to tackle *all* GAFAM-acquisitions. Supplemented with an effective ex ante tool, it could be possible to provide comprehensive antitrust and merger control for the EU. This will be investigated more in next Section.

The Commission has seen a need for further action. While it has not followed any of the previously established approaches, the Commission has acted in two different ways as mentioned in Section 1 and 2. The next Section uses previously established material to investigate whether this new Commission approach is appropriate in light of the Union's aims, principles and laws.

# 5. Preferred approach to killer acquisitions?

The Commission has decided to not to follow suggestions regarding the amending of the threshold requirements analysed in Section 3. Yet it has not been satisfied with the current legal toolset either. Instead, it has adapted the recommendations by the Commission's staff assessment. Among other things, it has noted that the full potential of Article 22 has not been utilized due to older instructions that artificially limit its usage.[227] At the same time, the Commission has proposed additional obligations for the online platforms with the DMA. These actions are considerably less drastic and well-targeted than alternative approaches proposed by papers[228], but a more thorough investigation is warranted. First, the new Guidance will be analyzed while keeping in mind the principles underlying the EU Merger Regulation. Same will be repeated with the Digital Markets Act. Finally, these will be analysed against the current EU merger control and antitrust tools, such as Article 102. Based on the outcome, it is possible to answer the research question and fulfil the purpose of this paper.

## 5.1 Article 22 of the EU Merger Regulation

Article 22 was invention of the 2004 Regulation, an amendment aimed to fix some problems found from the original draft regarding the turnover thresholds.[229] It applies post-notification, enabling Member States to refer mergers lacking a Community dimension to the Commission. Classically it has been also known as the 'Dutch clause', as it was instituted to enable the Netherlands, still

[227] Jones A and Sufron B, 'EU competition law: text, cases, and materials', (7th edn OUP 2019) p. 1094
[228] Stigler Committee, 'Stigler Committee on Digital Platforms: Final Report' (The University of Chicago Booth School of Business 2019) p. 98. Stigler report proposed reverse burden of proof, for example.
[229] Jones A and Sufron B, 'EU competition law: text, cases, and materials', (7th edn OUP 2019) p. 1095-1096

lacking its own merger control at that time, to refer cases to the Commission to investigate.[230] It contains certain requirements: only mergers which affect trade between Member States and threaten to affect competition significantly within the territory of the Member States or States making the request can be referred for the investigation. However, outside of these the Member States have little to no limitations: they can refer mergers under the EUMR's thresholds for the Commission to review or even those that do not fulfil their own national ones.[231] Despite this, Article 22 has not seen very much usage, partly because the Commission had advised restraint on its application.[232] This has recently changed when the Commission published its updated Guidance on Article 22 Referral (henceforth 'Guidance'), changing many of its longstanding policies on the matter.

## 5.2 Analysis of the Guidance on Article 22 Referrals

The new Guidance is explicitly meant to scrutinise the occurrence of killer acquisitions, among other things. It summarizes the results of the research by the Commission and mentions the digital sector as a special area of interest.[233] The Guidance recommends referral especially of the cases which may lead to "*the creation or strengthening of a dominant position… the elimination of an important competitive force, including of a recent or future entrant… the merger between two important innovators*" and "*the reduction of competitors' ability and/or incentive to compete…. including by making their entry or expansion more difficult*" among other things[234]. It further clarifies that referral is appropriate where the company's turnover "*does not reflect its actual or*

[230] ibid, p. 1095-1096
[231] Whish R and Bailey D, Competition Law (7th edn, OUP 2012) p. 850
[232] Jones A and Sufron B, 'EU competition law: text, cases, and materials', (7th edn OUP 2019) p. 1095-1096
[233] Commission, 'Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases' C/2021/1959, paragraphs 9-10
[234] ibid, paragraph 15

*future competitive potential*".[235] This could be "*a start-up or recent entrant with significant competitive potential that is yet to develop or implement a business model generating significant revenue."* The aim is "*to increase transparency, predictability and legal certainty as regards a wider application of Article 22 of the Merger Regulation."*[236]

These instructions seem to be consistent with the research results by the Commission that it aims to address, and singles-out potential scenarios where the killer acquisition theory of harm could be occurring credibly. Among other things, the Guidance governs scenarios that could disincentivise other firms from entering the market in the first place.[237] These points are precise and appear to be well-formulated. However, the Guidance fails to fulfil its stated purpose: while it is certainly transparent in its intentions, it does not seem to enhance the predictability or legal certainty of Article 22's application. If anything, the outcome is opposite. This is due to multiple reasons: first, the Member States can refer even cases below of their respective thresholds, which means that any merger can now end up being investigated by the Commission.[238] This is seen with the first referral under this new Guidance, the Illumina/Grail case. There, the French authorities referred the acquisition to the Commission even though it did not meet the national thresholds and Grail lacked any assets in the EU. However, due to its potential impact and high transaction value, it was deemed to affect the trade within the internal market and was accepted by the Commission for further review.[239] Because there is no need for the fulfilment of the traditional requirements, no firm can take adequate measures to be 'safe'. As long as the companies have cross-border activity in the

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[235] ibid, paragraph 19
[236] ibid, paragraph 12
[237] For example, this could be scenario where Google leverages its position as the owner of the Google Play in a situation where a highly innovative start-up with a unique product – such as app – would reject the acquisition offer from it. This could take form of Google declining start-up's access to Google's services; shadow ban it or otherwise pressure the start-up to accept the offer.
[238] Commission, 'Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases' C/2021/1959 paragraph 21
[239] Commission Press Release, 'Commission to assess proposed acquisition of GRAIL by Illumina', 109/2021

internal market and they are suspected of falling under any of the previously listed scenarios, theoretically any merger can be referred to the Commission.[240]

Secondly, the Guidance has included a possibility for the referral to occur sixth months after the merger. This is a de facto ex post investigation procedure. As established in the previous section, this seems disproportionate considering the level of threat posed and existing tools such as Article 102 which fulfil the same purpose. It causes additional legal uncertainty as the firms cannot have an assurance that their transaction will hold after the merger has occurred. When it comes to pure practicality, a 6-month window seems not appropriate considering the task either – many of the problematic acquisitions that the Guidance seeks to address can only be verified years after they have occurred. However, the Guidance clarifies that while it does "*not consider a referral appropriate where more than six months has passed*…" the referral could be appropriate "*in exceptional situations… based on, for example, the magnitude of the potential competition concerns and of the potential detrimental effect on consumers*."[241]

This remedies enforcement gap left by the 6-month window and allows the Commission to receive referrals without statutory limit. However, it is also a downside that it can start the investigation arbitrarily without statutory limit as the companies are never actually safe. These rules do not seem fit for the Guidance's stated purposes of predictability and legal certainty.[242] Even if granted this is a necessary procedure in order to tackle killer acquisition phenomena as a whole – which usually can only be verified post-merger – it should be formulated more precisely to address confirmed problem areas. For example, the empirical evidence suggests the killer acquisition phenomenon as a

[240] Commission, 'Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases' C/2021/1959, paragraph 13-14.
[241] ibid, paragraph 21
[242] ibid, paragraph 12.

prevalent in the pharmaceutical sector, which justifies the Guidance's focus.[243] However, it does not seem necessary to broaden the scope on the digital sector in a similar manner. It should be re-stated that despite speculation on their occurrence, killer acquisitions in the digital sector constitute a small number of suspected cases.[244] While they do merit attention, the Guidance would benefit from more careful wording. As concluded based on the investigation in Section 3, it is the acquisitions by GAFAM-companies specifically that warrants closer inspection. Instead of more careful wording formulated to address the pharmaceutical sector and acquisitions by the owners of online platforms, the Guidance highlights the digital sector as a special worry overall.[245] This indicates to Member States that the Commission is specifically interested to receive all referrals from this area which meet the criteria. As previously established, this seems disproportionate considering the limited evidence and other tools available. The Guidance would benefit from similar careful designation of the 'gatekeepers' as a target group as has been done in the DMA, which will investigated later.

Thirdly, the current Guidance is against the original purpose of Article 22. From a teleological perspective, it seems starkly inappropriate to utilize the wording of the legal text against its original intention.[246] It would be more befitting to proceed with the traditional amendment procedure in this instance, considering the potential legal uncertainty that ex post merger investigation procedure may produce. The Commission seems discretely changing the interpretation to suit better its current purposes. It should be highlighted that the Commission published this Guidance without any public

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[243] Cunningham C, Ma S and Ederer F, 'Killer Acquisitions' (2021), <https://papers.ssrn.com/abstract=3241707> accessed 25 May 2022

[244] Commission, 'COMMISSION STAFF WORKING DOCUMENT EVALUATION of procedural and jurisdictional aspects of EU merger control {SEC(2021) 156 final}' SWD(2021) 67 final 31 paragraphs 99-100

[245] Commission, 'Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases' C/2021/1959, paragraph 7, 9 and 10.

[246] Žaklina Harašić,'About teleological argumentation in law' (2021) < https://hrcak.srce.hr/file/229796> accessed May 2022 p. 33. Teleological argumentation is a broad area of study. For purposes of paper, the specific meaning is either historic interpretation or originalist interpretation, *"determination of the meaning of a text in line with the perception at the time of its adoption*."

consultation or a prior warning[247], depriving the businesses operating in the EU from transition period. The Commission has the right to take appropriate measures to prevent the distortion of competition in the internal market, yet this kind of sudden action may have counterproductive results. The trust that enables the level playing field can suffer if the rules change in such a profound way within a short period of time. The Commission's approach here seems vastly inappropriate even outside the bounds of the considerations for the killer acquisition theory of harm. This is further exacerbated by the fact that the Commissioner had promised both a public consultation and a transition period[248], which ended up not happening.

Overall, the Guidance seem to be both disproportionate considering its aim, especially regarding ex post control mechanism. The merging parties cannot have assurance that their transaction will hold, even after sixth month period is over. In similar manner, it broadens Article 22's scope in a manner which enables Member States refer even mergers which do not meet their national thresholds. Illumina/Grail case remains a good example of this. This is against the Guidance's stated aim of ensuring legal certainty and predictability. However, this approach could find success with less drastic formulation. Currently, there are not enough limitations in place. More specific targeting could make it suitable for the purposes of this paper.

## 5.3 Digital Markets Act

DMA has been crafted to respond to many challenges posed by the constantly changing, dynamic digital markets that the current competition law tools are ineffective to tackle due to their somewhat

[247] Latham & Watkins, 'New Guidance on Article 22 EUMR referrals to the European Commission' [2021] Antitrust Client Briefing, Latham & Watkins p. 1
[248] ibid

slow and time-consuming nature.[249] It does this by establishing many additional obligations for so-called 'gatekeepers' which practically can be narrowed down to GAFAM-companies[250]. This is due to threshold requirements the DMA uses to designate these gatekeepers[251]. The designation requirements are as follows:

> *A provider of core platform services shall be presumed to satisfy:*
>
> *(a)the requirement in paragraph 1 point (a) where the undertaking to which it belongs achieves an annual EEA turnover equal to or above EUR 6.5 billion in the last three financial years, or where the average market capitalisation or the equivalent fair market value of the undertaking to which it belongs amounted to at least EUR 65 billion in the last financial year, and it provides a core platform service in at least three Member States;*
>
> *(b)the requirement in paragraph 1 point (b) where it provides a core platform service that has more than 45 million monthly active end users established or located in the Union and more than 10 000 yearly active business users established in the Union in the last financial year;*
>
> *(c)the requirement in paragraph 1 point (c) where the thresholds in point (b) were met in each of the last three financial years.*

In addition, the gatekeepers have to have a significant impact on the internal market, operate an entrenched position in the foreseeable future for providing services that are important for business users (such as companies using apps) to reach end users (the consumers using the app).[252] Further, the Commission can under Article 15(1) conduct a market investigation to see whether a core platform service provider should be designed as a gatekeeper even if it does not meet the Article 2 requirements.[253] This can be due such things as business users being dependent on the provider, the

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[249] Cabral L, Haucap J, Parker G, Petropoulos G, Valletti T, van Alstyne M, 'The EU Digital Markets Act A Report from a Panel of Economic Expert' (2021) p. 9
[250] ibid. p. 9
[251] To further specify, according to Article 3(2) these are companies that are 'a providers of core platforms services' which are in Article 2(2) described as online intermediation services, search engines, social network services and others with similar attributes.
[252] Commission, 'Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on contestable and fair markets in the digital sector (Digital Markets Act) {COM(2020) 842 final' SWD(2020) 364 final Article 1(a)(b)(c)
[253] ibid, Article 15

size, entry barriers derived from advantages or other scale and scope effects that the provider benefits from[254].

Those companies designed as the gatekeepers will be under numerous obligations that are intended to limit potential market abuse and enhance competition.[255] For the purposes of this paper the relevant part is Article 12, which obligates them to inform the Commission about any intended merger involving another provider of core platform services or any other service.[256] The only way to escape this obligation is to apply for exemption under Article 9 and the grounds of public interest.[257] In practice this means that GAFAM-companies have to report all their potential mergers in the digital sector for the Commission to review, though the DMA does not otherwise take action against killer acquisition per se.

## 5.4 Analysis of the Digital Markets Act

The proposal provides an extensive elaboration on its purpose and legal basis. It is aimed to address various problem areas regarding the whole digital sector. This is necessary in order to ensure a fair, competitive and transparent internal market in accordance with the Commission Communication 'Shaping Europe's digital future'.[258]. The proposal has been justified due to the cross-border nature of the digital economy and given that the differing national rules addressing the problem areas lead to fragmentation. It is thus better to regulate at EU level, the legal basis being derived from Article

[254] ibid, Article 2
[255] ibid, p. 1-3
[256] ibid, Article 12
[257] ibid, Article 9
[258] Commission, 'Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on contestable and fair markets in the digital sector (Digital Markets Act)' COM(2020) 842 final p.3-4

114 of the TFEU.[259] The proposal also argues that it is proportionate as the burden is imposed in a targeted manner for 'gatekeepers'[260]. The list of obligations is designed to address specific unfair and harmful practices, providing thus the necessary legal certainty.[261]

These appear to be well-founded arguments with good justifications. As previously noted, the digital economy is a rising trading sphere for which it is reasonable to have uniform rules that apply across the internal market. Killer acquisitions aside, there are many well-documented unfair practices such as bundling that need to be addressed.[262] For these reasons it is easy to agree that the proportionality requirement is also fulfilled: many of these harmful practices are sector specific that may be hard to tackle with the current tools. However, it should be noted that the claim about establishing an adequate level of legal certainty can be disputed: Article 10 provides an open-ended possibility through a market investigation to enlarge the list of obligations for the gatekeepers. While it must be based on a public report "*which has to be produced within 24 months from the opening of the market investigation*"[263], this creates a certain level of unpredictability that the gatekeepers have to account for. The same can be said about the designation of the gatekeeper itself: even if they provide substantive proof to demonstrate that they do not satisfy the requirements for the designation, the Commission can under Article 3(6) identify it as a gatekeeper as long as Article 3(1) requirements are fulfilled.[264] These provisions may be understandable or even necessary additions considering the dynamic nature of the digital sector and its constant technological progress, but this creates an environment where it is not possible to foresee which practices are going to be illegal and for which companies.

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[259] Ibid. p. 4-5
[260] ibid p. 5-6
[261] ibid
[262] Crémer J, de Montjoye Y A and Schweitzer H, 'Competition policy for the Digital 15 Era' (2019) p. 57
[263] Commission, 'Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on contestable and fair markets in the digital sector (Digital Markets Act)' COM(2020) 842 final Article 17
[264] ibid, Article 3

For the purposes of this paper, the designation requirements for the gatekeepers seems reasonable formulated. This is because it has been demonstrated that it is specifically GAFAM-companies that are suspected of practicing killer acquisitions, which is the DMA's main target group. Article 3(1) defines a provider of core platform services as gatekeeper if "*a) it has a significant impact on the internal market; b) it operates a core platform service which serves as an important gateway for business users to reach end users; and c) it enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future."*[265] Specific thresholds in Article 3(2) add an annual EEA turnover equal to or above EUR 6.5 in the last three financial years or where it provides a core platform service that has more than 45 million monthly active end users in the Union and more than 10 000 business users, among other things.[266] As mentioned in the previous chapter, this narrows the designation quite comfortably to GAFAM-companies along with some others.[267] Article 12 obligates these actors to inform the Commission of any intended merger in the digital sector.[268] This is a cause of some proportionality considerations: not every transaction by GAFAM-companies warrants a merger review. It would be less intrusive and more appropriate to limit notification requirement only for those with attributes that the normal EU merger control is unable to capture. For the purposes of this paper, this could be all mergers with start-ups of high innovation potential[269]. It seems vastly disproportionate to refer all transaction

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[265] ibid, Article 3(19)
[266] ibid
[267] These kinds of core platform services are "(*i) online intermediation services (incl. for example marketplaces, app stores and online intermediation services in other sectors like mobility, transport or energy) (ii) online search engines, (iii) social networking (iv) video sharing platform services, (v) number-independent interpersonal electronic communication services, (vi) operating systems, (vii) cloud services and (viii) advertising services"* This group could potentially constitute some other online platforms, such as Spotify.
[268] "*A gatekeeper shall inform the Commission of any intended concentration within the meaning of Article 3 of Regulation (EC) No 139/2004 involving* ***another*** *provider of core platform services or of any other services provided in the digital sector irrespective of whether it is notifiable to a Union competition authority under Regulation (EC) No 139/2004 or to a competent national competition authority under national merger rules*."
[269] Though this may disincentive startups from entering the market in the first place, as being acquired is a valid exist strategy for many of them. This, in turn, would be in the detriment of the consumer welfare.

to the Commission: considering that it has been shown that acquisitions of GAFAM-companies in the technological sphere can have beneficial impact on competition[270], this may be to the detriment of consumer welfare if the associated costs disincentivise further competition and resulting innovation.

Overall, despite some considerations regarding the legal certainty and proportionality of the measures, the DMA seem to fulfil its intended function adequately well. It is well targeted at the right problem area without too going too far. Minor criticism aside, this paper endorses the approach chosen by this proposal as a suitable tool for its stated aim.

## 5.5 The Commission's approach – a correct way forward?

Together, the Guidance on Article 22 Referral and the Digital Markets Act enhance the Commission's toolbox with additional ex post and ex ante measures. All problematic transactions by GAFAM-companies will be inspected before their clearance by the Commission: and in the event of an acquisition being missed, it can be captured ex post by an Article 22 referral. As a result, the Commission has a full toolset which enables it to review all suspected transactions, latest when they manifest years down the line their anticompetitive qualities.

Irrespective whether these measures work, it should be asked first whether they are necessary. The Commission's actions must be in proportion to their stated aim: it has capacity to enact regulative

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[270] Zhe J G, Leccesse M and Wagman L, 'How Do Top Acquirers Compare in Technology Mergers? New Evidence From An S&P Taxonomy' (2022) NBER working paper 29642 <https://www.nber.org/papers/w29642> accessed 22 May 2022 p. 38

measures to the extent they are necessary for the functioning of the internal market.[271] If as a byproduct there is a considerable increase of legal uncertainty, it fails to fulfil its purpose and legitimacy. As stated in previous Section, this is the situation with the freshly released Guidance on Article 22 Referral. Illumina has challenged the Commission's authority on the matter of the Illumina/Grail merger, stating that it does not fall under EU merger control since it has no turnover in the internal market and Article 22 is not interpreted correctly.[272] This paper endorses Illumina's point of view: the Guidance was published too suddenly for businesses to have adequate time to react appropriately. This causes legal uncertainty while infringing the original intention of the clause. The Guidance is disproportionate considering its aim and according to the principle of subsidiarity, some mergers, such as the Illumina/Grail transaction, should have been handled at national level, if at all[273].

This serves as an example on what may occur when carelessly diverting from established procedures. While Article 102 is not perfect, it could be employed in a same manner as Article 22 referral to tackle killer acquisitions in the digital sector that manifest later down the line. Article 22 provides little than what Article 102 could not offer while creating additional considerations.[274] Even if using Article 102 is deemed too radical for the purposes of the stated aim, the Guidance at the current state is not fit for the task. It would benefit from a more careful wording, removal of ex post merger control (paragraph 21) and tailoring it with more precision. Fortunately, the Guidance

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[271] Article 3(3) Treaty on the European Union and Protocol 27 to the Treaties
[272] Case T-227/21: Action brought on 28 April 2021 — Illumina v Commission [2021] OJ C 252
[273] Article 5(3): *Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.*
[274]Also, Article 102 TFEU investigation could be understood as a guarantee of legal certainty: this is because mistaken clearance by the Commission is in itself a cause of legal uncertainty. Article 102 TFEU could be used to restore the trust ex post.

included a right to revisit the content and modify it in light of future developments[275]. Despite this criticism, it has good additions that would benefit both the DMA and the Guidance on Article 102 Enforcement Priorities. The DMA's Article 12 specifies that all mergers should be referred, but not all require inspection. Considering the vast amount of acquisitions GAFAM-companies engage in[276], this may cause unnecessary administrative burden. Better results could be achieved by incorporation references from the Guidance regarding the circumstances and properties that indicate when the acquisition is necessary to refer to the Commission.[277] In a similar manner, these could be useful for the Guidance on Article 102 Enforcement Priorities to separate tech acquisitions from the killer acquisitions.

Due to reasons laid out in the previous chapter, the DMA is appropriate for the task. With small modifications, it could function as an initial ex ante review for GAFAM-acquisitions while Article 102 could be employed at a later stage if needed.[278] This would enhance the current toolset which currently fails to capture suspected killer acquisitions in the digital sector ex ante. For this reason, it would complement the EU's antitrust tool and merger control with the challenge posed by the killer acquisitions in the digital sector.

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[275] Commission, 'Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases' C/2021/1959 paragraph 3

[276] Cabral, L., 'Merger Policy in Digital Industries, Information Economics and Policy', [2020]. Working Paper. New York University and CEPR 01/21

[277] Guidance, paragraphs 9-10, 15, 19 and 12

[278] Crémer J, de Montjoye Y A and Schweitzer H, 'Competition policy for the Digital 15 Era' (2019) p. 91. It could have broader help with enforcement of the DMA: for example, if the online platforms would refuse to grant the access to data under the DMA, they could be found to be abusing their dominant position under Article 102 as it prevents firms from entering the relevant market

## 5.6 Summary

The Guidance has considerably enlarged the scope of Article 22. Under the new interpretation, the suspected killer acquisition cases could be referred for the Commission's review even if they would not meet the national thresholds. This could occur ex post, which is a cause of concern in terms of legal certainty. In addition to this, the DMA obligates 'gatekeepers', mostly constituting GAFAM-companies, to notify all their mergers to the Commission ex ante. While this is disproportionate considering that not all transactions are of interest, with a minimal tailoring it is possible to make it better fit the stated purpose. It is concluded that the Guidance is currently both unfit and unnecessary, overlapping with the existing toolset while creating additional legal uncertainty. The DMA, however, is targeted appropriately and enhances the Commission's current capabilities in a manner that fits the stated aim. Therefore, it is concluded that it is useful supplement to the EU's antitrust and merger control toolset. Together with Article 102, it is possible to investigate killer acquisitions in the digital sector both ex ante and ex post in a manner which is optimal in light of the Union's aims and laws.

# 6. Conclusion

This paper researched the killer acquisition phenomenon as seen within the context of the digital sector. The intention was to provide comprehensive review on the scale of the problem, the reasons for the current challenges, and ultimately find the most suitable approach forward. This was achieved by establishing specific attributes for the phenomenon which to tackle. Based on this research, killer acquisitions represent a small number of the acquisitions occurring under EU's merger control turnover thresholds which would merit from the Commission's review. However, the studies on kill zone indicate that the problem could be considerably broader. The main suspects were narrowed down to GAFAM-companies, which have acquired considerable number of smaller start-ups in past years. Further studies verify that this practice has had anti-competitive effects, though the results are contrary to some extent. It was found that these effects and the cross-border nature of the problem merit an EU-wide action and fulfilled the requirements of the principle of subsidiary.

Some of more popular suggestions were investigated as a potential solution in light of the principle of proportionality. These included lowering the turnover thresholds, transactional value-based thresholds, and ex post control. While all had potential to address killer acquisitions in the digital sector to some extent, no one of them passed the proportionality test. This was because they were either inappropriate considering the nature of phenomenon, too drastic in light of problem's severity, or not necessary due Article 102 TFEU already providing similar function. The paper built on this analysis, and proposed Article 102 TFEU as a possible ex post solution. It seems suitable tool considering that 1) killer acquisitions usually become apparent at later stage, 2) there is no need to fulfil turnover thresholds, 3) an effect-based ex post procedure is necessary to differentiate killer acquisitions from beneficial tech acquisitions and to prevent false positives.

This paper further used case-law to address challenges regarding the application of Article 102 TFEU. The dominance can be established, even with the dynamic, evolving nature of digital markets. The anti-competitive practices and certain attributes of GAFAM-companies, such as their privileged position as the owners of online platforms, access to data and history of strategic acquisitions, could be used as an indicators for the dominant position. An abuse of dominant position may occur when the competitive process is distorted, which in theory governs killer acquisitions as well. Based on this research, it is concluded that Article 102 TFEU can be used to tackle killer acquisitions ex post in the digital sector in a proportionate manner which is suitable in light of Union's aims, principles and laws.

In the last Section, this paper investigated new Guidance on Article 22 Referral and the Digital Markets Acts, both of which are intended to address the challenge posed by the killer acquisitions in the digital sector. While both had their useful attributes, the Guidance fell short of fulfilling its stated aim. This is because it widened the scope of Article 22's use in a manner which increased legal uncertainty. It went against its original intention, encouraging Member States to refer suspected killer acquisitions for its review. This was formulated in a manner which created de facto ex post merger control. Meanwhile, the DMA proposal had minor challenges regarding the proportionality of its measure. Under it, all GAFAM-companies have to notify their mergers to the Commission, while only small portion of those have attributes which warrant closer inspection. However, unlike the Guidance, the DMA is properly target and enhances the current EU merger control and antitrust.

Based on the investigation, it can be concluded that while the current toolset offers opportunities that the Commission still has not employed, such as Article 102 TFEU, it alone is not sufficient.

This is because GAFAM-companies are engaging in a vast number of acquisitions, and both the EU merger control and Article 102 TFEU are unable to scrutinize them all. Most of GAFAM-acquisitions occur under the turnover thresholds, making the Commission dependent on the referrals by the Member States. Article 102 TFEU could be employed at later stage to target those which have produced noticeable killer acquisition characteristics based on the complaints and with the interim measures (in extreme cases), but the extensive number of potentially suspect GAFAM-acquisitions prevents it from being used as an exhaustive solution. While it is useful to have effect-based ex post procedure to separate tech acquisitions from killer acquisitions, the associated costs and harm to consumer welfare warrant some less burdensome form of action as well. Based on this, the DMA could fill this gap with a well-targeted ex ante approach. With GAFAM-companies being obligated to notify their acquisitions, it is possible for the Commission to screen the suspected killer acquisitions beforehand. Hypothetically, this would lower the need for Article 102 TFEU investigation and restricts its role to that of a 'fail safe' which could be used to capture transactions that the Commission has missed. Using these tools together, it could be possible to establish an effective ex ante and ex post measures that could be employed effectively against the killer acquisitions in the digital sector.

Killer acquisitions are relatively recent phenomenon whose level of concentrate threat in the digital sector is still questionable. Yet the existing studies provide indication of existing anti-competitive effects which warrant action. However, the Commission should not overreact and employ drastic measures which would be counterproductive for the consumer welfare. This is because some of the suspected killer acquisitions can be beneficial tech acquisitions, which merits more careful considerations to prevent false positives. The Commission's right to intervene is only to extent that it is necessary to ensure functioning of the internal market – by overstepping its boundaries it will lose its legitimacy. This may have been case with the Guidance on Article 22 Referral: it remains to

be seen what is the ultimately judgement by the EU Courts in Illumina/Grail case. This paper endorses combining Article 102 TFEU and the Digital Markets Act to provide comprehensive ex ante and ex post antitrust/merger control. The Commission would benefit from considering broadening the usage of 102 TFEU and utilize it to target those killer acquisitions that the Commission has initially missed. Together, they could provide an effective response to the challenge posed by the killer acquisitions in the digital sector.

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