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A comparative view of Killer acquisition by digital Gatekeepers : EU versus Kenya and Merger Control.

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Summary

Killer acquisitions pose a significant concern in antitrust law as they threaten the existence of innovative startups, which are vital for driving growth and introducing new products and services in industries.[1] When dominant incumbents acquire these competitor, their potential for innovation is snuffed out before it can be realised. Preserving competition is crucial for antitrust law especially in disrupting entrenched firms like digital gatekeepers. Killer acquisition refer to the incumbent firm buying out startups targets with the goal of eliminating future competition.[2] However the current merger control system, such as in Kenya is inadequate in capturing and addressing these acquisitions, particularly in the dynamic digital ecosystem. The European Union, with its advanced infrastructure and competition policy model has made notable progress in regulating digital gatekeepers. Considering proposals for effectively capturing such acquisitions, we will examine the existing merger control system of both the EU and Kenya. Attention will be given to understanding the concept of killer acquisition, theories of harm, market definition, threshold and notification requirements, the Digital Markets Act, referral mechanisms ,cases such as Illumina/Grail and Towercast, and potential policy changes. The aim is for the Competition Authority of Kenya to learn from the EU's approach and strengthen its merger control competition policy to effectively regulate digital gatekeepers and address the issue of killer acquisition.

[1] C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. Pa. L. Rev. 1879 (2020).
Available at: https://scholarship.law.columbia.edu/faculty_scholarship/2661 <accessed 19/5/2023>

[2] David Pérez de Lamo, Preserving Innovation Competition in the Digital Era: ´´Killer Acquisitions ´´. CPI July 2019<https://www.competitionpolicyinternational.com/wp-content/uploads/2019/07/Europe-Column-July-Quadriptych-2019-3.pdf > accessed 21/5/2023

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Preface

It has been an interesting journey to study European Business law at Lund University during 2021-2023. During this journey, I have had the opportunity to immerse myself in a diverse culture and community. I have been blessed to have meet many wonderful people Whose support, guidance, and encouragement have been invaluable throughout this challenging yet fulfilling journey.

First and foremost, special thanks to my family Cecilia Awuor Adalla, Gladys Acheing Adalla, George Adalla, Yonga , Caroline, Hawii ,Ricard and my dearest Sister Christelle Aloo. Your love, understanding and sacrifices have been the driving force behind my accomplishments, and I am profoundly grateful and blessed to have you as my pillars of strength.

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Christine Okaro

Lund , 24 May 2023.

Abbreviations

Art	Article
CAK	Competition Authority of Kenya
CA	Competition Act
CJEU	Court of Justice of the European Union
COMESA	The Common Market for Eastern and Southern Africa
DMA	Digital Markets Act
EC	European Commission
EU	European Union
EUMR	European Merger Control Regulation
GAFAM	Google(Alphabet),Apple, Facebook(Meta) Amazon and Microsoft
KES	Kenya Shillings
MS	Member States
NCA	National Competition Authority
OECD	Organisation of Economic and Cooperation Development
SSNIP Test	Small but significant non-transitory increase in Price Test
SPLC	Substantial Prevention and lessening of Competition.
TFEU	Treaty on the Functioning of the European Union
TDF	Télédiffusion de France (TDF).

1.0 Introduction

‘ *Competition policy does not exist in a vacuum: it is an expression of the current values and the aims of society and is susceptible to change as political thinking.*[3]

Innovation within the digital market is welcomed across many jurisdictions and particularly so for many businesses. The many acquisitions of start-ups by dominant competitors sparked the debate, the problem is however not the acquisition but the practice that is better known as ″killer acquisition″.

The practice involves dominant digital players acquiring potential or future competitors raising concerns about their impact and the adequacy of existing competition enforcement tools as well as the applicable theories in the digital market. Numerous debates and articles among academics, legislators, and authorities regarding the potential policy changes necessary to address these types of acquisitions. The key question is whether the current enforcement tools can effectively handle market definitions regarding killer acquisition and if the traditional theories of harm are applicable to digital markets or if a more specific theory is required to assess the effects of killer acquisition.

The well-known tech companies known as GAFAM include Google (Alphabet), Apple, Facebook(Meta), Amazon and Microsoft with dominant digital economic positions also referred to as digital Gatekeepers[4]. Homlström noted in his paper on Killer acquisition ″ *There are growing fears that such acquisition sprees might be a systematic market foreclosure strategy*, *under the radar of competition*

[3] Richard Whish & David Bailey Competition law, Oxford 2015 pg 20

[4] The definition of gatekeepers will be revisited when discussing the DMA.

authorities, that threaten innovation and potential competition alike.[5] According to Alex Karanja, killer acquisition should be a concern for both African and Kenyan regulators as they can suppress future competition. Due to their economic position and strength, they can maintain their dominant position within the digital market by eliminating potential competitors they secure their position.

The urgency for the Competition authorities across the world Kenya included have been gradually setting foundations to protect innovators through its competition regime .[6] The EU through the European Commission recently enacted the DMA act to specifically target GAFAM.

In the EU concerns have been deliberated as the existing merger control regimes being insufficient to oversee killer acquisitions fuelling the debate and proposals on the effective manner to deal with the enforcement gaps.

These acquisitions escape merger control scrutiny due to the low or zero revenue generated by start-ups rendering traditional merger thresholds inadequate[7]. However, such transactions pose risks of anti-competitive effects in digital markets, an example is that they can be regarded as barriers to entry or stifling innovation which contradicts any competition goals such as those in the EU. Consequently, antitrust authorities have responded reactively to prevent the consolidation of market dominance by digital gatekeepers and to safeguard innovation[8]. The merger regulators' roles are important as they

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[5] Holmström, Mats and Padilla, Jorge and Stitzing, Robin and Sääskilahti, Pekka, Killer Acquisitions? The Debate on Merger Control for Digital Markets (2018). 2018 Yearbook of the Finnish Competition Law Association, Available at SSRN: https://ssrn.com/abstract=3465454 or http://dx.doi.org/10.2139/ssrn.3465454 < accessed 13/02/2023.

[6] Alex Karanja, ´´why Killer acquisition should worry regulators(2020) Business Daily https://www.businessdailyafrica.com/bd/lifestyle/society/why-killer-acquisitions-should-worry-regulators-2374006

[7] J.Cremer,A. de Montaje, H. Schweitzer, Competition policy for the Digital Era released by the EU final report https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf

[8] Nicholas Levy, EU Merger Control : From Birth to Adolescence, Kluwer Law International 26(2) 195-218, 2003.

ensure fair competition by protecting consumers from monopoly power higher prices, reduced production, and limited innovation.[9] Nevertheless, many antitrust enforcers face the challenge of outdated theories of harm and practices that may not effectively address the evolving dynamic nature of digital markets.

The period between 2001 and 2018 accounted for a large number of acquisitions by GAFAM of start-ups which remained unnoticed by antitrust regulators and as more so as to their inability to scrutinize these transactions.[10] These acquisitions have resulted in the discontinuation of the target's innovation projects and further prevented future competition [11]. Cunningham's research in the pharmaceutical sector shed light while investigating the concept of killer acquisition and the effect such acquisitions had on the loss of innovation.[12] It is from this that the term "Killer acquisition" was born. The question that followed was the proper means to capture transactions with little to no turnover threshold by the National Competition Authority as well as the European Commission ('EC').[13] The issue with these transactions can be looked at from two vantage points. The acquisition can be direct where the incumbent of a digital market acquires the target which is an actual or potential competitor(direct

[9] Ibid (n. 8) see also Nicholas levy pg. 197.
[10] According to Elena Argentesi and others, 'Merger Policy in Digital Markets: An Ex-Post Assessment'(2019) DIW Berlin Discussion Paper 19, 60% of acquisitions made by digital providers such as Amazon, Facebook, and Google were of firms that were less than four years old. See Elena Argentesi, Paolo Buccirossi, Emilio Calvano, Tomaso Duso, Alessia Marrazzo, Salvatore Nava, Merger Policy in Digital Markets: An Ex Post Assessment, Journal of Competition Law & Economics, Volume 17, Issue 1, March 2021, Pages 95–140) https://doi.org/10.1093/joclec/nhaa020 <accessed 12/03/2023>
[11] OECD Secretariat, 'Start-ups, Killer Acquisitions and Merger Control-background Note'(20202) Organisation for Economic Co-operation and Development (OECD) DAF/COMP(2020), http://one.oecd.org/document/DAF/COMP(2005)5/en/pdf >Accessed 12/03/2023.
[12] Cunningham, Colleen and Ederer, Florian and Ma, Song, Killer Acquisitions (April 19, 2020). Journal of Political Economy, Vol. 129, No. 3, pp. 649–702, March 2021 , Available at SSRN: https://ssrn.com/abstract=3241707 or http://dx.doi.org/10.2139/ssrn.3241707
[13] Ibid

merger). Indirect acquisition takes place where the incumbent acquires the target and supplies a complementary product or service thus depriving the competitor an opportunity to improve their product and become a competitor.

The main challenge is that most targets are start-ups in their early stages of development which require the competition authority to conduct a hypothetical analysis of the potential future growth of start-ups. This calls for a comprehensive assessment and calls for an expansive approach to the assessment conducted by the relevant authority. Cunningham's assessment highlighted the issue of under-enforcement, from observation there appears to be the situation in the EU and Kenya. It is important to point out that although Kenya is yet to issue a comprehensive study of killer acquisition the fast growth of the digitalized economy[14]. Through a joint statement of the African heads of Competition dialogue on the regulation of Digital Markets issued on the 18th of February 2022. Kenya(Competition Authority of Kenya) is committed to learning due to the mutual understanding and information sharing in a collaborative approach to the regulatory challenges that the digital market poses[15]. The understanding facilitates and informs current legislation on how to apply regulation and approaches to consider when tackling killer acquisitions. The inspiration can also be drawn by conducting a comparative analysis by understanding the path which the EU has taken from the merger control failures to the enactment of the DMA.

[14] Ibid (n. 12)
[15] CAK, African regulators team up to check digital markets, Friday 18th 2022. https://www.businessdailyafrica.com/bd/news/cak-african-regulators-team-up-to-check-digital-markets-3721828 >accessed on 6/3 2023.

The EU merger control framework was plagued with challenges including the lack of jurisdiction on the EC partly due to the very nature of start- apps .   The gaps included the insufficiency of the antitrust provision, notification challenges seeming that killer acquisitions were non-notifiable , the threshold requirements, can there be a suitable theory of harm market definition. The current turnover thresholds set out in Articles 1(2) and 1(3) of the EUMR[16] prescribe that the concentration needs to have a community dimension and further value turnover requirements need to be fulfilled. [17] The merger control system on the threshold is outdated in the face of digital markets.[18] The European Commission's report on Competition policy for the Digital Era (″EC Digital Report″) had the sentiments that it was too early to change EUMR's Jurisdictional threshold. Notably, the MS transaction performance would need to be monitored to justify the amendment to the EUMR thresholds. [19] The antitrust provision as it stood meant that scrutiny over the acquisition by gatekeepers and other digital firms was limited as the competition authorities were ill-equipped for the digital markets.[20]

The consequence of these mergers witnessed Competition authorities striving to develop theories of harm as well as the introduction of additional tools to address the perceived enforcement gaps. The result of the above pushed for the enactment of the Digital Market Act as well as reliance on the referral provision Article 22 EUMR. The same cannot be said for Kenya although the recent amendment of

[16] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004.
[17] Ibid 9 (council regulation on control of concentrations between undertakings
[18] Monika Woźniak-Cichuta, Teleological Perspective of EU Merger Control and its Interplay with Killer Acquisitions on Digital Markets 2020, Proceedings of the International Conference held in Prague on January 24–25, 2022 p. 149-162 https://rozkotova.cld.bz/EU-ANTITRUST-2022/149/ <19/2/2023.>
[19] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer (European Commission), Competition Policy for the Digital Era (4 April 2019), http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf [Accessed 17 March 2023].
[20] Ibid (n. 5)

the merger control regulation is an indication that the Competition Authority of Kenya is sharpening the tools within its arsenal drawing inspiration from the EU.

1.1 Purpose and Research Question

This paper aims to explore the concept of killer acquisition by digital gatekeepers within the framework of the EUMR (European Union Merger Regulation) and the role played by the regulation in the assessment of such transactions. It seeks to demonstrate the existence of an enforcement gap in the traditional merger control system. Additionally, the paper highlights the case law which relied on Article 102 TFEU as an enforcement tool to address non-reportable acquisitions and as an alternative and proof that an ex-ante provision is a comprehensive tool against killer acquisition transactions.

This thesis aims to examine the role of the ″Dutch provision, ″also known as Article 22 EUMR and its intended purpose. Additionally, it explores how the DMA(Digital Markets Act) complements enforcement efforts, specifically focused on gatekeepers. The DMA and the referral mechanism function collaboratively with the DMA serving as a supplementary tool to promote competition, fairness, and contestability.

The analysis highlights the difficulties competition authorities encounter in market definition during merger review, particularly when assessing the impact of killer acquisition using traditional theories of harm. The question arises as to whether the implementation of the DMA will effectively address digital issues and resolve the challenges posed by digital gatekeepers. The purpose of the DMA is to enhance fairness and competition in the digital market.

This paper aims to compare the approaches of the EU and Kenya in addressing issues related to killer acquisition. It seeks to identify the enforcement gaps in both jurisdictions and to assess the adequacy of the tools employed in both jurisdictions. By drawing inspiration from the EU's approach, a comparative analysis will be conducted as means of learning how one jurisdiction reigns in the conduct of digital gatekeepers within the digital ecosystem. The paper will also explore the need if any for recommendations inspired by the European model to enhance the Kenyan competition policy and operations in the digital sector.

To fulfil the purpose of this paper, the following questions will be answered:

1. How should digital markets be regulated specifically with digital gatekeepers in mind for both EC and the EC ?
2. What is killer acquisition and is there a suitable theory of harm in the digital ecosystem that is suitable to digital incumbents ?
3. What are the different jurisdictional challenges and enforcement challenges faced by the Competition authorities in both the EU and Kenya in capturing killer acquisition?
4. What does the EU aim to achieve with the DMA and Article 22 EUMR referral mechanism ?

   Can Kenya rely on the EU as an exemplary model for its competition regime?

This thesis aims to address the issue of killer acquisition, which poses significant concerns for competition authorities due to the detrimental effect on innovation and competition. The paper will assess whether the Competition Authority of Kenya requires specific tools to effectively tackle this issue through the implementation of merger regulation to close the enforcement gaps within the digital ecosystem. To draw inspiration, a comparative analysis with the EU will be conducted, exploring the possibility of enacting a similar DMA act or relying on the antitrust provisions under the Competition Act of Kenya as potential solutions.

The paper differentiates itself by conducting a comparative analysis of the status of merger control vis-a-vis the newly introduced DMA. The paper shall rely further on soft law instruments such as reports to provide a more comprehensive understanding of the topic.

1.2 Methodology

To answer the research questions this thesis employs various methods across the chapters and sections. The primary methodology utilized is comparative legal research, analysing the approach taken in the EU and assessing its applicability to Kenya. The aim is to comprehend the functioning of the DMA and the EU merger control system and their influence on policy formulation to address killer acquisition transactions.[21]

Firstly, a descriptive approach will be employed to present and define the concept of killer acquisition, drawing from relevant literature that extensively covers the topic. This approach includes defining concepts, classifying case law, and establishing rules applicable to such transactions.

[21] Mike McConville and Wing Hong Chui, Research Methods for law 2nd edition Edinburg university press 2017 https://edinburghuniversitypress.com/pub/media/resources/9781474404259_Research_Methods_for_Law_-_Introduction_and_Overview.pdf

Secondly, a descriptive approach will be employed to understand the unique characteristics and challenges of the digital market. This will be complemented by a comparative legal research approach to differentiate the challenges faced in digital markets between the EU and Kenya, respectively.

In terms of materials, the legal dogmatic method will be employed by relying on authoritative sources such as legislation and case law. The research will utilize primary sources of law, including treaties, as well as secondary sources such as the EU Merger Regulation and Article 102 TFEU. The focus will be on identifying the shortcomings of antitrust regulation through an analytical examination of the EUMR, notification, and threshold requirements. The analysis shall involve the notification and the threshold requirements as prescribed under the Kenyan merger control system.

A legal research methodology will be utilized to describe the DMA and Article 22 EUMR, highlighting the systematic rectification in an attempt to enhance clarity following the inadequacy of the antitrust provisions. This will involve referencing primary and secondary sources of law to establish a framework for evaluating the EU by conducting a detailed analysis of the enforcement tools.[22]

Opinions of the General Court and the European Court of Justice (CJEU)Have been referred to through case analysis. Other forms of materials, such as articles, blogs, and websites have been relied on throughout the thesis.

[22] Jerome Hall Law Librart- Maurer School of Law, 'Legal Dissertation: Research and Writing Guide´<http://law.indiana.libguides.com/disserationguide >accessed 12 March 2023

1.3 Delimitations

The paper shall have necessary delimitations namely the political aspect on killer acquisition shall not be the subject of focus. Further, the comparative analysis will be restricted to two jurisdictions namely Kenya and the EU. The DSA will not be discussed in this thesis noting its significance in establishing transparency and accountability for online platforms. [23]

To prevent ambiguity, within this paper the ´gatekeepers,´ incumbent´, ´ digital firms´ and ´start-app´ and ´targets´ -will be used interchangeably in the later Gatekeepers shall refer to incumbents as defined in Art. 2 and 3 of the DMA act. The legal basis of the DMA shall be analysed only from a general perspective.

The thesis shall focus on digital gatekeepers as well as challenges posed by antitrust provisions, market definition, threshold and notification requirements, and theories of harm. The focus shall be limited as there will be any discussion concerning fines sector inquiries and as well as interim measures issued by the European Commission.

1.4 Outline

This thesis comprises five chapters.

The introductory chapter presents the problem to be addressed. The second chapter provides an overview of killer acquisition, covering its definition, theory of harm, and the challenges related to

[23] EC, ´The Digital service Act: ensuring a safe and accountable online environment< http://ec.europa.eu/info/digital-services-act-ensuring-safe-and-accountable-online- environment_en < accessed 18/3/2023>

market definitions. Additionally, it discusses the importance of addressing concerns raised by killer acquisition within the context of EU merger control, including its relevance in applying the threshold tests and addressing the enforcement gap.

In the third chapter, a comparative analysis is conducted on merger control regimes in the EU and Kenya. This analysis focuses on the application of the dominance test with relevant applicable case law and Commission decisions that continue to shape the approach and development of enforcement tools. The chapter through analysis of existing case law on the EU highlights the challenges related to thresholds and jurisdictional analysis with specific reference to the illumina/grail case.

The fourth chapter examines the comparative enforcement tools employed within the respective jurisdiction in the EU vis -a vis Kenya. This includes the utilization of the referral mechanism through Art. 22 EUMR and the introduction of the DMA in the EU whilst in Kenya the use of referral via COMESA and the Merger control regime. The discussion includes the reintroduction of Art.102 TFEU an *ex-ante* tool as highlighted in the Towercast case while analysing the Advocates General's opinion. The chapter also considers the limitations of the enforcement tools and offers policy recommendations.

Lastly, the fifth Chapter concludes the thesis by summarizing the previous discussions and providing final remarks on the topic.

2.0 KILLER ACQUISITION OF NASCENT AND POTENTIAL TARGETS

This section will introduce and define the concept of killer acquisition by analysing the different definitions provided by the literature. It will also address the theory of harm and the challenges in applying traditional theories to killer acquisition. Additionally, the difficulties in assessing market definition will be highlighted from the EU and the Kenyan perspective the chapter concludes with a summary.

2.1 What is Killer Acquisition?

Killer acquisition suggests, the '*idea that a firm acquires another firm to 'eliminate potentially promising, yet likely competing for innovation*[24].' It refers to the act of a firm acquiring another firm with the intention of eliminating potential competitors and their innovative projects. There are differing arguments about the specifics of what constitutes killer acquisition, two scenarios align with this description. The first scenario involves a dominant firm acquiring an innovative target and deliberately halting the target's innovation for future competition.[25] The second situation occurs when the dominant firm acquires a target company and kills off its own internal effort to develop a competing product eliminating the risk of competition from its newly acquired subsidiary.[26] Holmström raises concern about the acquisition spree that could potentially serve as a strategic market foreclosure tactic, evading competition authorities and posing a threat to both innovation and competition as highlighted in the statement:

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[24] John M. Yun, 'Potential Competition and Nascent Competitors' (2019) 4 Criterion J on Innovation 625 <19/2/2023.>

[25] Ibid (n. 12)

[26] Chris Pike, Start-Ups, Killer Acquisitions And Merger Control 6 (2020), https://one.oecd.org/document/DAF/COMP/WD(2020)29/en/pdf

"There are growing fears that such acquisition sprees might be a systematic market foreclosure strategy, under the radar of competition authorities that threaten innovation and potential competition alike.[27]

Based on this, the acquisition of nascent competitors can result in two outcomes: integration into the acquiring company's structure or the consolidation of market dominance by stifling competition through the termination of the target's innovative projects. The acquisition of innovative start-ups[28]without regulatory oversight[29]has the effect of harming consumers and strengthening the dominant market position by suppressing competitive innovation from the outset.

Killer acquisition encapsulates the primary intention of a potential or actual competitor's intention to halt a competitive constraint, a product's development, and or innovation.[30] Does a motive exist for such an acquisition? Cunningham acknowledges incumbents are better at exploiting technologies by acquiring targets to realize synergies, effectively enabling specialization, and increasing innovation.[31]

According to the Furman report(2019), there is a concern about false positives in acquisition assessments, where incorrect assumptions.[32] lead to the approval of acquisitions that should have been prevented. The report highlights the significant issue of potential competition loss in the digital market.

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27 Ibid (n. 5)

28 Ibid (n. 12)

29 Smith, Stephen & Hunt, Matthew. (2020). Killer acquisitions and PayPal/iZettle. Competition Law Journal.https://heinonline-org.ludwig.lub.lu.se/HOL/Page?handle=hein.journals/comptnlj18&id=160&collection=journals&index=#

30 Vaclav Smejkal, 'Concentrations in Digital Sector - A New EU Antitrust Standard for "Killer Acquisitions" Needed?' (2020) 7 InterEULawEast: J Int'l & Eur L, Econ & Market Integrations 1 < accessed 14/02/2023.

31 See Cunningham *et al.*

32 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."<accessed 14/03/2023.>

Cunningham, Ederer, and Ma utilized a theoretical model in the pharmaceutical industry data to explain the discontinuous development to base their findings .[33] Axel Gautier and Joe Lamesch proposed a three-condition test to identify the anti-competitive nature of killer acquisition transactions.[34] These conditions include having the same core business for both the acquirer and the acquired, a large user base for the target, and the presence of a distinct brand that sets the target apart.

To break down their analysis the startups may have a large product portfolio and could be a contender for the incumbent firm and a future competitor[35] The term ″killer acquisition now encompasses the suppression of future competition, regardless of the nature of the acquired entity. Policymakers are particularly concerned about dominant digital businesses acquiring potential competitors.[36]

These acquisitions often fall below the value threshold that would require the buyer to notify the relevant competition authority prior to the merger.[37]

Consequently, competition authorities lacked the ability to assess the impact of the transactions before it was finalized.[38] This means that even if harmful effects on consumers might be difficult to quantify the transactions should be prohibited when the dominant platform employs strategies to reduce competitive pressure without clear consumer welfare gain.[39] The existing merger control regime in the

33 Ibid (n. 12)

34 Gautier, Axel and Lamesch, Joe, Mergers in the Digital Economy (2020). CESifo Working Paper No. 8056, Available at SSRN: https://ssrn.com/abstract=3529012

35 Ibid (n. 12)

36 Stigler Committee on Digital Platforms (2019). Final Report [online]. [cit. 2022- 01-05]. Available at: https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf

37 Ibid

38 Ibid

39 Ibid (n. 18)

EU focuses on the minimum turnover threshold where the minimum turnover for the target business.[40] having established that Killer acquisitions fall outside merger control scrutiny due to the size of the target as the existing revenue is low that traditional merger thresholds are not satisfied[41]

2.2 Definition

Killer acquisition refers to a situation in which a dominant player in a market makes the direct or indirect acquisition of an innovative or promising player (target) in order to strengthen its position on the market.[42] The consequence or objective is to prevent the emergence of a potential competitor in the market. The term ″killer acquisition was initially examined by Cunningham, Ederer, and Song Ma (2020) in the context of the pharmaceutical industry. They defined it as an acquisition where the acquiring firm shuts down the target to eliminate competition with its own product, research, or development efforts. This study led to the emergence of the term ″killer acquisition.″ According to their findings, such acquisitions result in the cessation of innovation and a disincentive for future competition. While this definition primarily applied to horizontal mergers in the pharmaceutical sector, other authors argue that there may be various motives driving the acquisition of targets.

A good example is described in the following manner acquisition of nascent competitors by incumbent firms' sole purpose ''to discontinue the targets innovation projects and pre-emptive future

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[40] Ibid (n. 27)

[41] Alexiadis, Peter and Bobowiec, Zuzanna (2020) "EU Merger Review of 'Killer Acquisitions' in Digital Markets - Threshold Issues Governing Jurisdictional and Substantive Standards of Review," *Indian Journal of Law and Technology*: Vol. 16: 2, Article 4.
Available at: https://repository.nls.ac.in/ijlt/vol16/iss2/4 <accessed 22/3/2023>

[42] Cynthia Picart, Killer acquisitions, Dictionary of competition law, Concurrences, Art. No. 109482 https://www.concurrences.com/fr/dictionnaire/killer-acquisitions <accessed 10/2/2023>

competition."[43] From the definition, the assumption is that the incumbent exercising market power in order to avoid competition buys and terminates new innovative projects and firms. (either by eliminating or shelving it or the product or services the start-up was developing).

Cunningham's definition is referenced as the suppression of future competition[44]it describes a post-acquisition scenario that results in the acquired firm ending its development or production.[45] Berre (2020) defines, ″killer acquisition″ as leading the absorption and subsequent discontinuation of competitive emergent start-ups undermining welfare by reducing productive efficiency and incentive for competitive innovation.[46]

The term ″ killer acquisitions″ is often referred to as ″shoot-out acquisitions″[47] by the Economist. It involves the purchasing of startups with the intention of eliminating a potential rival. This practice poses a high risk of harming both consumers and the market by reducing potential rivals on the market while increasing concentration on data, or technologies, thereby impeding competitors' access to them[48]

The European Telecommunication Network Operators describe killer acquisition as ″pre-emptive mergers[49] where a company acquires a competitor solely to terminate the target′s innovation project and

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43 Ibid (n. 12)
44 Ibid (n .24)
45 Ibid (n. 33) pg. 632
46 Berre, Max, Killer Acquisition Theory in the Digital Age (July 30, 2020). Available at SSRN: https://ssrn.com/abstract=3788536 <8/03/2023.>
47 The Economist, ´Nostrums for Rostrums´´ 27th March 2019 https://www.economist.com/leaders/2016/05/26/nostrums-for-rostrums.
48 Ibid
49 European Telecommunications Network Operator's Association, Response to the Call for contribution 'Shaping Competition policy in the Era of Digitalization'(2018) https://ec.europa.eu/competition/scp19/contributions/etno.pdf#:~:text=ETNO%20welcomes%20the%20opportunity%20to%20respond%20to%20the,antitrust%20and%20merger%20cases%20in%20the%20digital%20economy. < accessed 30/3/2023>

prevent future competition.[50] Hutchinson *et al* *paper* describes ″killer acquisition″ as where big companies acquire promising startups to neutralize potential rivals.[51]

From the above definitions, killer acquisition can be described as the discontinuation of present or future competition by protecting the market share[52]of the dominant incumbent. The term denotes a characteristic of anti-competitive behaviour with the intent to disrupt the potential and or future competitor.

The term ″killer acquisition″ refers to a theory of harm outlined in the OECD paper where either the product or service is deliberately targeted, leading to the demise of competition.[53]This theory emphasizes two key notions: either both the product and services cease to exist, or competition itself is eliminated through the acquisition.

2.3 Theory of Harm

The EUMR plays a crucial role to prevent mergers that could possibly lead to material harm to the consumers in the form of higher prices, reduced quality, innovation, or variety.[54]There are several theories of harm within the EC arsenal of tools that can identify any merger that can result in harm to consumers.[55]This is not to say that the attempts by the EC have not passed through challenges in

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50 OECD website Start-ups, killer acquisitions, and merger control - OECD

51 Hutchinson CS,Berdnikova AA,Treščáková D,Samorodeskii DS,Lobanov DI, Semtsiva SI. Big Tech's acquisition challenge to EU merger control. European Competition Journal, January 2023.doi:10.1080/17441056.2023.2193454.< accessed 4/4/2023>

52 Ibid(n. 27).

53 OECD(2020). Start- ups, Killer acquisitions and Merger Control, p. 10.

54 Alistair Lindsay and Alison Berridge, The EU Merger Regulation: Substantive Issues(5th ed., Sweet & Maxwell 2017) 1-029

55 Ibid 31 pg(Alistair) 1-029

developing new theories of harm as was established in the GE/Honeywell[2004][56] and the General Electric Company *v* Commission[57] In the second case the EC regarded the role of merger control as limited to the application of relatively well-established theory of harm.

Merger control theories of harm are particularly useful as they help with the assessment of an undertaking's potential threat to the competition which triggers the intervention of a Competition authority. A complexity exists with regard to the digital market as traditional assessment is ineffective due to the dynamic nature of the digital ecosystem.

In April 2019 Commissioner Vestager in consultation with appointed advisors in a report addressed this particular concern.[58] The emphasis was on the theories of harm and the identification of anti-competitive strategies. The takeaway from the consultation was that the EC needs to develop an expansive arsenal of theories of harm to capture transactions that effectively impede competition within the internal market.[59] The traditional theory of harm considers the relevant market that the firm is operating in and identifies the three categories that the concentration might fall under horizontal, vertical, and conglomerate. Notably vertical and conglomerate acquisitions are less likely to pose a threat to competition compared to horizontal acquisitions.[60]

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[56] [2004] OJ L 48/1
[57] Case T-210/01[2005] ECLI:EU:T:2006:416
[58] J.Cremer,A. de Montoje, H. Schweitzer, Competition policy for the Digital Era released by the EU final report https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf
[59] Ibid (n. 31) 1-029
[60] Guidelines on the Assessment of non-horizontal merger under the Council regulation on the Control of concentration between Undertakings [2008] OJ C 265(2008/C 265/07) para 11.

The traditional theories of harm have been ineffective in enforcing mergers but their applicability to startup acquisition by digital incumbent raises questions. Crémer, Montjoye, and Schweitzer's report recognizes that the European Merger control framework has been insufficient, leading to under-enforcement Type 2 error) in digital company mergers.[61] Rather than focusing solely on market structure, the emphasis should be on potential or emerging competition as outlined in the Commission's Horizontal Merger Guidelines.[62]

The theory of harm in killer acquisition centres around the incumbent firm acquiring an innovative company and subsequently shutting it down to eliminate the production of a potentially threatening product.[63] It is argued that authorities should not solely focus on one-sided markets such as substitutability as this would imply that nascent acquisitions are vertical acquisitions.[64]

The analysis should not overlook the multi-sided nature of the market in which these firms operate. The Commission will assess the adverse impact that the particular merger has on the market as a basis of intervention.[65]

[61] https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf

[62] Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, para 60.

[63] Ibid (n. 39)

[64] OECD 2020 DAF/COMP(2020)5 start-ups, killer acquisitions, and merger control – background note

[65] Esteva Mosso, Carles and Vande Walle, Simon, EU Merger Control: How to Remove Anticompetitive Effects? (May 1, 2020). Remedies in EU Competition Law - Substance, Process and Policy, Kluwer Law International 2020 (Damien Gerard & Assimakis Komninos, eds.), Available at SSRN: https://ssrn.com/abstract=3676987 < accessed 5/04/2023 >

For the EC to intervene, there needs to be substantial evidence of harm to ″innovation competition.″[66] An example of such a case is DOW/DuPont merger where the EC evaluated the detrimental impact on both competition and future innovation.[67]

The EC expanded the use of the innovative theories of harm in its assessment by considering ″ innovative spaces ″ instead of focusing solely on current and future product markets. In this case, Innovative spaces encompassed more than the individual downstream market, including the target new active ingredients. This case is significant as it demonstrates the EC′s shift in evaluating innovation theories of harm and extending the application of the standard unilateral effects model beyond price effect and competition innovation.[68]

The case highlights a shift in the EC′s approach to assessing innovation effects, and expansion to include the early-stage product and ideas of development. It demonstrates the EC ′is adaptability and evolution in analysing, future killer acquisition transactions. Exploring the theory of harm related to killer acquisition is crucial as it considers the transaction's anti-competitive nature.[69] Another alternative is the nascent potential competitor theory of harm this theory which examines both the competition and the product itself. [70] The EC′s competitive assessment focused on ″innovation spaces″ rather than current future product markets.[71] The theory of harm in killer acquisitions related to mergers

[66] Nelson Jung, Innovation theories of harm in merger control: plugging a perceived enforcement gap in anticipation of more far -reaching reforms ? E.C.L.R. 2019, 40(6), 266-275
[67] Commission Decision of 27 March 2017 declaring a concentration to be compatible with the internal market and the EEA Agreement No. M.7932(Dow /DuPont), 2017 O.J. C 353. http://ec/competition/mergers/cases/decisions/m7932_13668_3.pdf <accessed 17/3/2023>
[68] Ibid (n 48)
[69] Ibid (n.39)
[70] Cunningham et al pg 58
[71] Ibid (n. 64)

incentivizes the elimination of future competitive pressure, leading nascent firms to stifle the acquired firm´s innovation instead of nurturing it[72] (hence the term killer acquisition)[73]

2.4 Challenges in Market Definition

Antitrust authorities consider various factors when defining the relevant market. The EC bases its understanding of market definition on the Market Definition notice from 1997[74] which serves as the legal basis for EU court case law. Market definition is crucial for assessing anti-competitiveness, anti-competitive agreements, unilateral conduct, and mergers by competition authorities.[75] EU competition law utilizes the relevant market to establish market share thresholds and market power which inform the theory of harm in competition.[76] Defining a relevant market becomes challenging when the innovation of a potential competitor has not yet been activated. Although a broad market definition could address this, proving dominance remains difficult for antitrust regulators.[77]

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[72] Ibid (n. 41) p 7

[73] OECD(2020)' Start-ups, Killer Acquisition, and Merger Control <www.oecd.org/daf/competition/start-ups-killer-acquisition-and-merger-control-2020.pdf > accessed 4 march 2023 p 31

[74] Commission Notice on the definition of relevant market for the purposes of Community competition law Paragraph 4. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997Y1209(01)&from=EN.

[75]Commission Decision of 11/03/2008 Case No COMP/M.4731Google/DoubleClick https://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf <accessed 4/03/2023>

[76] Robertson, Viktoria H.S.E., Antitrust Law and Digital Markets: A Guide to the European Competition Law Experience in the Digital Economy (February 28, 2020). The Routledge Handbook of Smart Technologies: An Economic and Social Perspective (2022), Chapter 21 (p. 432- 456), Available at SSRN: https://ssrn.com/abstract=3631002 < accessed 28/02/2023>

[77] Schweitzer, Heike and Haucap, Justus and Haucap, Justus and Kerber, Wolfgang and Welker, Robert, Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen: Gutachten für das Bundesministerium für Wirtschaft und Energie (Modernising the Law on Abuse of Market Power Report for the Federal Ministry for Economic Affairs and Energy) (August 29, 2018). Available at SSRN: https://ssrn.com/abstract=3262210 <accessed 29/03/2023>

Defining the relevant market is a complex economic assessment conducted by the Commission and subject to a review by the CJEU as was demonstrated in the Microsoft v Commission case.[78] In ClearStream v Commission, the General Court emphasized that the relevant market should not be defined in an abstract manner but rather on a case-by-case basis.[79]

The EC previously used the product functionality and quantitative pricing test for market definition. The relevant product market encompasses interchangeable or substitutable products or services based on consumer perception of their characteristics, prices, and intended use.[80] When considering the geographical market, the EC takes into account areas where the conditions of competition significantly vary in terms of the supply and demand of products or services.[81]

The two assessments are important but their suitability in the evolving digital market is in question as they pose challenges for competition authorities. The price-based technique becomes problematic in the digital market due to the presence of multisided platforms where users do not directly pay for the services or when the services are offered for free.[82] The SSNIP test is limited in its ability to assess the suitability of different products and services based on small price changes.[83]

In 2019 Commissioner Vestager announced the EU's intention to review market definition, acknowledging the changing functionality of markets since the publication of the Notice on Market

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[78] Case T-201/04 Microsoft v Commission[2007] ECLI:EU:T: 2007: 289 para 482 see also Case T-342/99 Airtours v Commission[2002] ECLI:EU:T:2002:146 para-26.
[79] Case T-301/04 ClearStream v Commission ECLI:EU:T:2009:317, para 55.
[80] Notice on Market Definition, para 7.
[81] Notice on Market Definition ,para 8.
[82] Catriona Hatton, David Gabathuller and Alexandre Lichy, Digital Markets and Merger Control in EU: Evolution, Not Evolution?(2018) https://www.competitionpolicyinternational.com/wp-content/uploads/2018/02/CPI-Hatton-Gabathuler-Lichy.pdf <accessed on the 17/3/2023>
[83] Small but Significant and Non-transitory Increase in Price test.

definition in 1997. The EC aims for an *accurate and up-to-date and set out a clear and consistent approach to both antitrust and merger cases across different industries in a way that is easily accessible.*[84]

Defining markets in the digital market´s product dimension is challenging due to markets development and unique characteristics that challenge the traditional notion of substitutability.[85] Three major challenges in the digital market definition are zero-price services, multisided platforms, and ecosystems.[86]

The definition of the digital market is uncertain due to its unique characteristics such as zero-priced services and market changes. In a multi-sided market, transactions are typically non-transactional and do not involve direct transactions between the users on the platform. [87] In a multi-sided market, it is important to consider multiple players when assessing substitute goods or services. In the Google Android case[88] the EC utilized the small but significant non-transitory decrease in quality test (SSND) ; which expanded the range of tools used for competition assessment. However, there is still uncertainty regarding the implementation of these tools. Schweitzer et al. (2018) suggest a broader market definition as part of competition law reform to address killer acquisition.

The EC has previously distinguished separate markets within activities during the merger. For example, in the Facebook/WhatsApp case, the EC examined individual markets relating to users separately from the online advertising activity on the social network provider.[89] However, relying on static economic

[84] Margrethe Vestager ,Defining markets in a new age Competition Conference Brussels, 9 December 2019 https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/defining-markets-new-age_en. <accessed 12/03/2023>
[85] Ibid (n. 74)
[86] Ibid (n. 67)
[87] Ibid (n. 67)
[88] Case T-604/18 | Google and Alphabet v Commission (Google Android) ECLI:EU:T:2022:541
[89] Case No. COMP/M.7217- Facebook/WhatsApp, decision of October 3, 2014.

indicators like market share and profit margin has proven challenging in the digital realm. In the Microsoft/Skype case, the Commission recognized that market share can rapidly change in nascent and dynamic sectors, providing preliminary indications of competition. in a short time and provide only a preliminary indication of a competitive situation.[90] The General Court In Cisco system v Commission stated that in a fast-growing sector,*" large market share may turn out to be ephemeral" that in a dynamic contest, high market power is not necessarily indicative of Market power"* [91]

In Kenya, defining the relevant market and determining dominance poses challenges for the Competition Authority of Kenya(CAK). The economic standard of analysis and the SSNIP test is considered insufficient in addressing the complexity of the digital market as reported by the CAK.[92] The CAK has revised its market definition to capture multi-sided markets, digital markets, and temporal dimensions in defining markets.[93] This is crucial as the CAK is expanding its definition to capture market definition in cases in the digital sphere.

2.5 Summary

The chapter introduced and defined the concept of killer acquisition, by highlighting what the concept entails and illustrated the different definitions provided by different academic literature. One finding from the definition is that concept is adaptable across various sectors, as demonstrated in part

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[90] Case No.COMP/M.6281-Microsoft/Skype, decision of October 7, 2011, para 78 and 99.

[91] Case T- 79/ 12 Cisco Systems Inc V Commission ECLI:EU:T:2013:635 para 69

[92] United Nation conference on trade and development Trade and Development Board Trade and Development Commission Intergovernmental Group of Experts on Competition Law and Policy Nineteenth session Geneva, 7–9 July 2021 Item 5 of the provisional agenda (Distr.:General 28 April 2021 TD/B/C.I/CLP/57

[93] https://one.oecd.org/document/DAF/COMP/GF/WD(2020)33/en/pdf

2.2. Secondly the section highlighted the challenges of relying on a traditional theory of harm in the face of evolving digital landscape, where digital gatekeepers can easily adapt their strategies. The challenges of in identifying an appropriate theory of harm in the digital sector was discussed in an attempt to demonstrate the suitability of applying traditional theory of harm to transactions involving killer acquisitions. There is a need for antitrust enforcers to place distinctions between horizontal, conglomerate, and virtual effects due to the differences between complementary and suitability of products and services given the evolving nature of digital markets. Their assessment should be expansive while exploring the novel theories of harm associated with killer acquisition to capture harms in these unique markets. one such proposal is relying on the Killer acquisition theory of harm in assessing the effect of the transaction in the market.

The third challenge stems from market definition and substitutability which require a detailed, factual, and economic analysis. Competition authorities are required to exercise caution in their assessment due to the nature of digital ecosystem considering the fact that digital gatekeepers are involved in multiple related and or connected market. Competition authorities should take an expansive market definition as the narrow assessment proved challenging as was highlighted in the case law . Competition authorities should conduct a market study to understanding the novel theories of harm specific to the digital economy. The analysis above provides insights for learning and understanding to the CAK whom expressed the challenges in market definition.

3.0 COMPARATIVE ANALYSIS OF MERGER CONTROL AND ANTITRUST LEGISLATION IN THE EU AND KENYA

This section examines the dominance gap, turnover-based threshold, jurisdictional challenges, and notification procedures in the EU and Kenya using the EU illumina/grail case as an example. It highlights the limitations of the EU turnover-based threshold in capturing the dynamics of startups in the digital market and the lack of scrutiny of mergers involving dominant digital gatekeepers by antitrust authorities. The section will highlight the difference in the merger control system in both jurisdictions to gain a better understanding.

The EU merger control framework includes a mandatory pre-merger notification system based on the monetary value of the transaction as outlined in Art. 1 of Council Regulation (EC)No. 139/2004 The turnover thresholds specified in Articles 1(2) and 1(3) of the European Union Merger Regulation(″EUMR″) determine whether the merger falls under the scope of merger control.[94] Acquisitions in digital markets involving start-ups with low to zero turnovers at the time of acquisition often escape the scrutiny of the EC. This challenge will be espoused further in the illumina/grail case.

Merger control in Kenya is regulated by the Competition Act No. 12 of 2010[95] read together with the Competition(General) Rules 2019. [96] Both jurisdictions, Kenya and the EU have different legislation but share the common goal of preventing anti-competitive practices in their respective markets.

[94] Regulation 139/2004
[95] http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2012%20of%202010
[96] http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2019/LN176_2019.pdf

The CAK aims to ensure that transactions do not result in anti-competitive practices in the market in order to enhance the competitive market and protect consumer welfare. In the EU there have been a few acquisitions that have been reviewed these include Google/DoubleClick,[97] Google /Motorola Mobility [98] Facebook/WhatsApp[99] Microsoft /LinkedIn, Apple/Shazam[100], and Google/Fitbit[101] . These cases provide insights into the enforcement regime of dominant firms in the EU and shed light on the evaluation of digital firms by the EC. The EU merger control framework emphasizes the importance of a mandatory pre-merger notification system. The challenge with killer acquisition transactions is that these acquisitions do not meet the jurisdictional threshold and thus proceed without undergoing merger review. The systemic failures in the EU contribute to entry barriers in the digital markets, including network effects,[102] data driven feedback loop[103], and high upfront sunk cost.[104] The EC's reliance solely on the merger threshold requirement when reviewing acquisitions by digital gatekeepers has exacerbated its dominance.

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[97] Google/DoubleClick (Case COMP/M.4731)Commission decision of 11 March 2008,C(2008) 927 final.

[98] Google/Motorola Mobility (Case COMP./M.6381)Commission decision of 13 February 2012,C(2012) 1068

[99] Facebook/WhatsApp (Case COMP/M.7217 Commission decision of 3 October 2014,C(2014) 7239.

[100] Apple/Shazam(Case COMP/M.8788)Commission Decision of 6 September C(2018), 5748 final.

[101] Google/Fitbit(Case COMP/M.9660) Commission Decision of 17 December C (2020) 9105.

[102] Network effects can be characterised as a situation in which the value of the product or services increases with the increase of consumers using the product see : Aridi, Anwar; Petrovcic, Urska. 2019. Big Tech, Small Tech, and the Data Economy: What Role for EU Competition Law?. World Bank, Washington, DC. http://hdl.handle.net/10986/33124 ."<accessed 17/04/2023>

[103] Ibid the ability of digital platforms using the online searches of their clients to collect large scale data which they use to improve their efficiency. OECD (2016),´´ Big Data bringing Competition policy to the Digital Era,´´ DAF/COMP (2016) 14,12 OCTOBER 2016 P.11< Big data: Bringing competition policy to the digital era - OECD <accessed 20/04/2023>

[104] Ibid ,Crémer Report p.112

3.1 Dominance Gap

Merger control involves *ex-ante* assessment of concentrations. The concentration ability to engage in business activities that prevent effective competition from being maintained lies in the very essence of the dominance test. [105] Article 102 TFEU as a guardian provision ensures that acquisition by dominant firms that may substantially affect trade between Member States within the internal market is prohibited.[106] The purpose is to prevent an undertaking from acquiring on its own merit a dominant position in the market as was espoused in the Konkurrensverket *v* TeliaSonera Sverige AB. [107]

The position as referenced by Art.102 TFEU relies on the position of economic strength by an undertaking that enables it to prevent effective competition from being maintained in the relevant market. The economic power enables the undertaking to behave to an appreciable extent independently of its competitors, and ultimately of its customers.[108] There are several factors that can be derived from the dominant position which can be taken separately and not necessarily determinative.[109] They include market share which is compared to that of its competitor which is a good indicator of a dominant position.[110] Other crucial factors to consider are countervailing buyer power and barriers to entry or expansion. These factors can hinder potential competitors from having to access the market or prevent

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105 Richard whish and bailey pg 823

106 See Art.102 TFEU. Alison Jones, Brenda Sufrin Niamh Dunne, Jones &Sufrin's EU Competition law: text, cases, and materials (7th edn, Oxford University Press 2019)277

107 Case C-52/09 Konkurrensverket v TeliaSonera Sverige AB, EU:C:2011:83. Para 24

108 Case C-27/76 United Brands and United Brands Continental v Commission, EUCL:EU:C:1978:22. Para 65 Case C-85/76 Hoffmann-La -Roche v Commission,EUCL:EU:C:1979:36 para 38 Case T-201/04 Microsoft v Commission EUCL:EU:T:2007:289,para 229

109 Case C-27/76 United Brands and United Brands Continental v Commission, EUCL:EU:C:1978:22. Para 65 .

110 Case C-27/76 United Brands and United Brands Continental v Commission, para 111, Case C-85/76 Hoffmann-La -Roche v Commission para 48 Case T-395/94 Atlantic Container Line and Others v Commission, EUCL:EU:T:2002:49 para 341 Case T-336/07 Telefónica v Commission, EUCL:EU:T:2012:172 para 163

actual competitors from expanding their activities in the market.[111] Dominant undertakings have an implied obligation to ensure genuine undistorted competition in the internal market.[112](this principle may also apply in Kenya) This special responsibility imposed should be considered in light of the specific circumstances of each case including situations that reflect dominance in the markets. The research suggests that the mentioned principles can be applied to digital gatekeepers due to their dominant position in the digital market. Therefore, it is important for the digital gatekeepers to demonstrate compliance with the conditions derived from the Post Danmark case.[113]

The efficiency gains resulting from their conduct counteract any negative effect on competition; those gains have been or are likely to be brought about as a result of their conduct, and its conduct is necessary for the achievement of those gains in efficiency. Lastly, its conduct does not eliminate effective competition gains by removing all or most existing sources of actual or potential competition.

For transactions relating to killer acquisition, one can argue that they already satisfy the conditions to trigger the application of Article 102 TFEU. The EC in a detailed impact assessment report noted that Art. 102 TFEU is insufficient to deal with acquisitions in the digital market as the intervention of Art. 102 TFEU operates *ex post*.[114] This is not to say that the EC has not made valiant efforts to apply the use of Art. 102 TFEU to establish the existence of dominance. In the Google shopping decision, the EC

[111] Case C-27/76 United Brands and United Brands Continental v Commission, para 122, Case C-85/76 Hoffmann-La -Roche v Commission para 48

[112] Case T-228/97 Irish Sugar v Commission EUCL:EU:T:1999:246 para 112; Case C-209/10 Post Danmark A/S v Konkurrencerådet EUCL:EU:C:2012:176 para 23

[113] Case C-209/10 Post Danmark A/S v Konkurrencerådet para 172 Case C-23/14 Post Danmark A/S v Konkurrencerådet, EUCL:EU:C:2015:651, para 49.

[114] Impact Assessment Report para 119 -123

used market share and sales amount to evaluate market power.[115] However , Article 102 TFEU *per se* rules do not account for market effects and consumer welfare.

3.2 Dominance Gap in Kenya

In Kenya, a dominant position in the market is determined by the ability of a person to engage in production or service provision within the country as outlined in section 4(3) of the Competition Act.[116] The Competition Act 2010 provides in Section 4(3)(b) that *" a person has a dominant position in the market if the person provides or otherwise controls not less than one-half of the services that are rendered in Kenya or any substantial part thereof*[117]*"* A person under Article 250 of the Constitution of Kenya[118] denotes a Company, Association, or other body of persons whether incorporated or unincorporated. This section is read together with section 23 of the Competition Act of Kenya which sets out the criteria for determining the dominant position.[119] For the conduct of an undertaking to amount to the abuse of a dominant position in a market in Kenya or a substantial part of Kenya, they must fulfil the conditions set out in section 24 of the Competition Act of Kenya.[120] In Kenya, the criteria for determining an abuse of dominance consist of four elements : (i) the entity must meet the definition of an "undertaking"; (ii) the undertaking must hold a dominant position on a relevant market (iii) the

[115] Google Search (shopping)(AT 39740)[2017] C(2017) 4444 final, para 267 Article 102 TFEU guidance para 13
[116] Competition Act of Kenya No. 12 of 2010 www.kenyalaw.org
[117] Ibid
[118] The Constitution of Kenya 2010 www.kenyalaw.org
[119] Ibid (n. 111)
[120] Ibid

undertaking's conduct must qualify as an abuse and ; (iv) the abusive conduct must be within the Kenyan market or substantial part of thereof.

The Competition Authority will evaluate whether the business operates within Kenya regardless of the service location or where the agreement was formed and whether it targets or intends to target customers in Kenya. These provisions are consistent with the EU definition of abuse of dominance under Art.102 TFEU. The objective of the Competition Act in Kenya, as stated in Section 3 is to prohibit the creation and abuse of market power that could undermine effective competition. However, the existing provisions regarding dominance and abuse of dominance are inadequate when it comes to addressing the challenges posed by digital gatekeepers.

The enforcement of Article 102 TFEU faces limitations in adapting to evolving technologies.[121] One challenge is the retroactive nature of the provision, as it can only be triggered only after the conduct has already occurred and the EC becomes aware of it.[122] Additionally, gathering information for cases involving data-based conduct can be time-consuming and complex.[123] The Competition Authority of Kenya has acknowledged the challenges in market definition, and it is reasonable to assume that similar difficulties would arise when enforcing sections 23 to 24[124] in relation to digital gatekeepers. These challenges underscore the complexities faced in regulating the digital market. The investigative effect of any remedy awarded under the violation of Art.102 TFEU is limited to the specific case in which it is applied.

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121 Witt, Anne C., The Digital Markets Act – Regulating the Wild West (March 21, 2023). (2023) 60(3) Common Market Law Review, Forthcoming, Available at SSRN: https://ssrn.com/abstract=4395089

122 Ibid

123 Ibid

124 Competition Act of Kenya www.kenyalaw.org

3.3 Threshold requirement in the EU

The merger notification threshold is based on the monetary turnover value of a concentration. Mergers must be notified in most jurisdictions, typically based on specific turnover, assets, or market thresholds. The EU thresholds requirement serves a dual purpose, as a filter for the transactions and as an allocative tool between the EC or national competition authorities.[125]The EU and Kenya regimes are flexible to allow for investigation for mergers that violate the relevant antitrust provision, i.e., Article 101 or 102 TFEU in the EU and Section 42 of the Competition Act in Kenya. Merger control regimes vary across jurisdictions including both the EU and Kenya In the EU, the notification thresholds are defined by Art. 1 of the Council regulation 139/2004 which considers monetary turnover.[126]

For the EC to review an acquisition, it must meet the community dimension criteria which is determined by the parties' individual and combined turnover within the EU. The turnover must not exceed certain thresholds, and if it does, the ″one-stop-shop assessment by the EC comes into play.[127] This means that the EC has the authority to examine the acquisition without the need for review by national competition authorities.

Acquisitions of startups have posed challenges due to their low turnover which often falls below the threshold for scrutiny by the Competition Authority scrutiny.[128] Cunningham , Ederer, and Ma's paper revealed that the prices of many acquisitions involving overlapping drugs clustered below the threshold

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[125] Ibid (n. 63)

[126] Council Regulation 139/2004 of 20 January 2004 on the control of Concentration between undertakings, O.J[2004] L 25/1

[127] Ibid(n. 80)

[128] Anne Looijestijn-Clearie, Catalin S. Rusu, and Marc J.M. Veenbrink, ‘In search of the Holy Grail? The EU Commission’s new approach to Article 22 of the EU Merger Regulation, Maastricht Journal of European and Comparative Law 2022, Vol. 29(5) 550–571

for antitrust review unlike non-overlapping projects.[129] The anti-competitive effect of an acquisition justifies the intervention by any national competition authority.[130] Start-apps do not generate high turnover in the early stages of their lifespan; however, their corporate value is an indication of their degree of innovation.[131] Accordingly, the threshold criteria is not adept to capture killer acquisitions as the market share of start-ups is small despite the immense potential growth that they have.[132]

In order to trigger the mandatory notification requirement in the EU concentrations must exceed a specific threshold. This threshold serves as a crucial criterion in which the EU merger regulation, ensuring that significant concentrations are subject to scrutiny and evaluation[133] when :

(a) The combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million, and

(b) The aggregate Union-wide turnover of each of at least two of the undertaking concerned is more than EUR 250 million

Unless each of the undertakings concerned archives more than two-thirds of its aggregate Union-wide turnover within one and the same Member State."

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[129] See Cunningham et al at 40-41

[130] Letina, Igor and Schmutzler, Armin and Seibel, Regina, Killer Acquisitions and Beyond: Policy Effects on Innovation Strategies (October 2021). University of Zurich, Department of Economics, Working Paper No. 358, Revised version, Available at SSRN: https://ssrn.com/abstract=3673150 or http://dx.doi.org/10.2139/ssrn.3673150 < accessed 18/3/2023>

[131] Tim Schaper, 'Merger Control Reform: Capturing Transactions in the Digital Markets' (2016) Norton Rose Fulbright November 2016 https://www.nortonrosefulbright.com/en/knowledge/publications/9eb81dda/merger-control-reform-capturing-transactions-in-the-digital-markets <accessed 20/03/2023>

[132] Ibid (n. 18)

[133] Council regulation (EC) No. 139/2004 of 20 January on The control of concentrations between undertakings (the EC Merger Regulation)

Additionally, if a concentration does not meet the aforementioned Community dimension conditions, criteria where:

a) The combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million.
b) In each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million.
c) In each of at least three MS included for the purpose of point (b), the aggregate turnover of each of at latest two of the undertakings concerned is more than EUR 25 million; and
d) The aggregate Union-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million Unless each of the undertakings concerned archives more than two-thirds of its aggregate Community-wide turnover within one and the same MS."

A concentration that does not fit the criteria of the Community dimension is subject to review under the national competition laws of at least three MS informing competent authority by means of a reasoned submission that the concentration should be examined. Based on the criterion mentioned above a high level of revenue serves as an indicator of the transaction´s economic impact on the internal market[134]which is relevant for a jurisdictional test to determine whether the merger should be notified. The turnover-based threshold has been questioned regarding its suitability for digital acquisition by gatekeepers where the target generates minimal or no turnover. Suggestions have emerged to complement the turnover threshold with one based on the monetary value of the transaction. The

[134] Ibid (n. 122)

reason behind this is that it would allow the EC to review acquisitions of targets with low turnover [135] as a higher transaction value could indicate future revenues expected from the target.[136]

The issue of killer acquisition has sparked numerous policy debates aiming to address the challenge of competition authorities not being notified about such transactions. One potential policy reform was to enhance the existing notification threshold and introduce additional criteria based on transaction values. Germany and Austria took a proactive approach by introducing additional complementary thresholds requiring notification to the relevant authority of the merger regardless of whether the threshold is met or not. [137] This ensures that potentially problematic mergers are brought to the attention of authorities for assessment and scrutiny. However, the issue with amendments of the turnover-based threshold away from the EU standard means that there is a high risk of over-enforcement (as noted by Catriona Hatton, David, and Alexandre 2018).[138] Paragraph 38 of the commission guidelines on the assessment of horizontal mergers requires that the EC pay attention to factors: prices, output choices, quality, and innovation when reviewing a merger.[139]

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[135] Bourreau, Marc and de Streel, Alexandre, Digital Conglomerates and EU Competition Policy (March 11, 2019). Available at SSRN: https://ssrn.com/abstract=3350512 < accessed 13/04/2023>

[136] Ibid p. 30

[137] In Germany the 9th amendment to the Act against restaurants of Competition (´´ARC´´), published in the Official Journal on June 8,2017 https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2021/19_01_2021_GWB_Novelle.pdf?__blob=publicationFile&v=3 For Austria the amendment to the Law on Competition,https://competitionlawblog.kluwercompetitionlaw.com/2021/09/20/austria-introduces-significant-changes-to-its-competition-law/

[138] Ibid (n. 68).

[139] Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentration between undertakings, O.J[2004] C31/5 para 8 and para 38

3.4 Threshold requirement in Kenya

In Kenya, the regulation of merger control falls under the purview of the Competition Act No. 12 of 2010 read in conjunction with subsidiary legislation. These laws play a crucial role in ensuring fairness in competition and the prevention of anti-competitive practices in the country's market. This legislation provides a framework for ensuring that transactions adhere to the Merger Threshold Guidelines and operate to identify transactions that are notifiable as well as transactions that are prohibited.[140]

Section 42 (1) of the Competition Act 2010 outlines the requisite conditions to determine threshold rules . This read together with the Merger threshold guidelines and the Competition (General) Rules, 2019 aims to improve transparency and predictability of the enforcement process for the benefit of the business community.[141]

The notifiable mergers under the Competition (General) Rules, 2019 specifically rule 4[142] outlines the necessary requirements to include : (a)The parties combined turnover or asset value whichever is higher is at least KES 1 billion and the turnover or asset value of the target in Kenya is more than KES 500 million. Additionally (b)if the parties are in the same market or can be vertically integrated the asset value in Kenya exceeds KES 10 billion unless the transaction meets the COMESA Competition Commission Merger Notification Thresholds which Kenya is a member .[143]

The COMESA merger control thresholds are met if two-thirds of the parties' turnover or value of the assets is generated or located in Kenya. The Competition Act of Kenya allows the authority to review

[140] This includes a variety of cases such as buyer power which is not a topic of discussion in this thesis but worth mentioning as an example.
[141] ibid(n. 91 & 92)
[142] Ibid
[143] Ibid (n. 71) p. 940-941

any transaction which would have otherwise been excluded for a full notification if it is likely to raise a competition or public interest concern. (killer acquisition transactions qualify both as a competitive and public interest concern).

The General Rules 2019 provide that a merger shall not be subject to notification if it is taking place wholly or entirely outside of Kenya and has no local connection. The competition authority of Kenya: if an undertaking party to the merger has a significant presence in Kenya based on the turnover or assets in or into Kenya : whether revenue is generated in Kenya by an undertaking to a merger ;or Whether an undertaking party to the merger acquires direct or indirect control over the strategic commercial affairs of the other undertaking party to the merger and such strategic commercial decision will have an effect on trade in or into Kenya.[144]

3.5 Jurisdictional Challenges (Effectiveness Of A Purely Turnover Based Criterial ILLUMINA/GRAIL CASE

This case will highlight the ongoing discussion and development in the merger control regarding the adequacy and effectiveness of the jurisdictional thresholds. It raises questions about whether the commission has the authority to scrutinize acquisitions that threaten to stifle innovation and competition either by absorbing or eliminating promising rivals. The competence of the EC was in question as the argument raised by Illumina was that Art. 22 of the merger regulation did not grant the EC competence to initiate an investigation into a concentration which failed to meet the referring MS conditions under national merger control rules. Furthermore, there were concerns regarding the time -

[144] Ibid rule 5 - 8,

limits for commission invitations for referral, and MS referral requests . Another aspect to consider is whether the decision infringes on the principle of protection of legitimate expectation given the Commission's power to change competition policy on referral.

The illumina/grail case[145] is the most instrumental case which challenges the functioning of the EU merger control system. It raised important issues which included: (i) the concentration at issue (ii) the notification of a concentration without an EU dimension (iii) the competence and appropriateness of referral request (iv) the time limit for referral and (v) the impact of the acquisition on the trade.

Although the above has been mentioned it is important to reiterate and dissect the issues to give a clear overview of the analysis of the case.

The case utilized Art. 22 EUMR following the invitation by the European Commission to MS to make a referral. The significance of the decision lies in the acquisition that fell below the turnover threshold for EC notification requirement as the acquisition was not notified to any MS in the EU but instead, it came to the attention of the EC through a referral from France, joined Belgium , Greece, Iceland, the Netherland, and Norway on the premise of the impact on trade and competition within the territory of the MS that made the referral.[146] On the 19th of April France first made the referral[147] the practical guidance on the other hand was enacted was enacted on march 2021 the timelines of the practical guidance on referral came indicate that the implementation of the policy will face significant challenges.

[145] Case -T-227/21, EUCL:EU:T:2022:4477

[146] https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5364

[147] Press release : Merger : Commission opens in-depth investigation into proposed acquisition by Illumina 22 July 2021. https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3844

The critics view it as an effort to alter history and unlawfully expand the EU's jurisdiction, thereby disregarding companies' reasonable expectations.[148]

Illumina is a leading multinational company based in the US which developed, manufactured, and commercialized systems of medical devices to develop and run blood tests that could detect cancer or adopt appropriate therapies for cancer patients. Illumina developed market-integrated systems for large-scale analysis of genetic variation and biological functions[149] Grail, on the other hand, developed blood-based cancer tests based on Genomic sequencing and data science tools. Further Grail produced a multi -cancer detection test.

In September of 2020, Illumina announced its intention to acquire Grail and the acquisition will be based in the EU and in the US territory. The estimated value of the transaction was estimated to amount to 7.1 million dollars. The concern for the EC was based on Grail not generating any revenue in Europe and the transaction was non-notifiable which justified its intervention .[150] The deal would impact the single market and would significantly affect competition within the territory of the MS that made the referral.[151] Commissioner Vestager in a press release stated *"'If companies jump the gun and implement deals that are subject to our review they undermine the effective functioning of our EU merger control system. This is a serious breach of the standstill obligation. Illumina and Grail have openly done*

[148] Natalie McNeils, Nicholas Hirst: Illumina-Grail case exposes controversy behind EU grab for non-notifiable mergers 07/April 2021 : https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/mergers-and-acquisitions/illumina-grail-case-exposes-controversy-behind-eu-grab-for-non-notifiable-mergers

[149] www.bloonberg.com/quote/ILMN:US

[150] https://www.stibbe.com/publications-and-insights/the-long-and-unwinding-road-of-killer-acquisition-illuminagrail

[151] Press release, Mergers: Commission to assess proposed acquisition of Grail by Illumina, 20th April 2021,https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5364 <accessed 6/4/ 2023 >

so by implementing their deal while the commission is still conducting its in-depth investigation. This could result in hefty fines.[152]"

The acquisition of Grail was not subject to notification under the EUMR. However , April on 19, 2021, the French competition authority referred the acquisition of Grail to the EC[153] with Belgium, Greece, Iceland, the Netherlands, and Norway joining the referral. As a result, Illumina was prohibited from implementing the proposed acquisition until the EC granted approval following an in-depth assessment. The main question was whether the transaction was compatible with the internal market. Despite this Illumina completed the acquisition without waiting for the approval of the EC which was an unprecedented move.[154] Consequently, an open investigation was launched to assess whether the completion of the acquisition was a breach of the standstill obligation set out in Art.7 of the EU merger regulation. A statement of objection[155] was issued in addition to the interim measures taken by the EC under Art 8 (5)(a) of the EU merger regulation.[156] Grail, being a non-revenue generating undertaking both in the EU and globally did not meet the criteria for a European dimension under Article 1 of Regulation No. 139/2004. Consequently, the acquisition was thus not notified to the European Commission as outlined by Article 4(1) of that regulation.

[152] Press release, Mergers : Commission alleges Illumina and Grail breached EU merger rules by early implementation of their acquisition, 19th July 2022, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4604 <accessed 6/4/2023.

[153] Ibid (n. 103)

[154] Ibid

[155] Press release, Mergers: The Commission starts investigation for possible breach of the standstill obligation in Illumina/ GRAIL transaction, 20 August 2021, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4322 ; see ibid (n. 150)

[156] Press release, Mergers: The Commission adopts interim measures to prevent harm to competition following Illumina's early acquisition of GRAIL, 29 October 2021, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_5661

Illumina alleged that the EC lacked the competence to examine the acquisition and the interpretation of Art 22 EUMR was misconstrued further the use of Art. 22 EUMR violated the principle of subsidiarity, legal certainty, and proportionality.[157]

The General Court ruled in favour of the Commission and also accepted the referral, the decision taken by the EC which produced legal effect and was reviewable.[158] under paragraph 184 the General Court held:

Accordingly, the Commission was right by the contested decision to accept the referral request and the request to join under Article 22 of regulation No 139/2004. Contrary to the view of the applicant and Grail, neither a legislative amendment nor a revision of the European dimension threshold was, therefore, necessary for the application of that provision in the present case.[159]

The implication of the EC's reliance on Art 22 EUMR for the digital economy is that it enables the Commission to examine killer acquisitions without the need to amend the Merger regulation to introduce a transaction-based threshold.[160] The second argument raised questions about the French competition authority's adherence to the time limit specified in EUMR. Article 22(1) of the Merger Regulation referral requests should be submitted within 15 working days from the moment the concentration is ″made known″ to the MS. Although the article sets a specific time limit the General Court emphasized the importance of conducting administrative proceedings within a reasonable

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[157] Application by Illumina in Case T-227/21

[158] Case T-227/21 Illumina v Commission ECLI:EU:T:2022:447, para 79-80.

[159] Ibid (n. 127) para 183-184

[160] Marios Lacovides, Analysis ´´The General Court confirms the Commission´s approach to referrals from Member states under Art. 22 of the Merger Regulation: Illumina *v* Commission´´(T-227/21) 26th July 2022 https://eulawlive-com.ludwig.lub.lu.se/analysis-the-general-court-confirms-the-commissions-approach-to-referrals-from-member-states-under-art-22-of-the-merger-regulation-illumina-v-commission-t-227-21/# <accessed 18/04/2023>

timeframe. This is due to competition policy being a fundamental general principle of EU law as incorporated in Article 41(1) of the Charter of Fundamental Rights. Moreover, the parties involved were not adversely affected by the duration of the EC investigation.[161] The third argument raised concerns the EC's actions towards the concentration in question after the introduction of the new Guidance on Art 22 EUMR. The communication harms Illumina's legitimate expectations and legal certainty as there were factual errors in the communication of legitimate expectations. However, the General Court stated that Illumina failed to demonstrate receiving "precise, unconditional, and consistent assurances from the EC's approach to Art 22 referral, which would have formed the basis of their expectations.[162]"

Interestingly the review of the case took place after the acquisition Leading the Commission to utilize alternative measures like adopting Art. 22 of the EUMR to uphold effective competition.[163] The question arises as to why the Commission preferred to use Art 22 EUMR instead of implementing a value-based threshold.[164] The answer lies in the Staff working document which indicates that not all concentrations with high value or high value-to-turnover ratio are completely significant.[165]

According to Vidal, " Article 22 of the EU merger regulation aims to examine "killer acquisition" in dynamic and innovation-focused markets like digital pharmaceutical and life sciences.[166]" The EC has the competence to review mergers that raise significant competition concerns within the EU even if the

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[161] Ibid
[162] Ibid (n. 150)
[163] Ibid 103 (press release)
[164] Ibid (n. 123)
[165] Staff Working Document 2021 points 135, 136.
[166] Robert Vidal, EU courts merger ruling signals increased gun jumping risk for firms, 29 July 2022 https://www.pinsentmasons.com/out-law/news/eu-courts-merger-ruling-signals-risk-firms

concentration has no activities in Europe or falls below the EU merger threshold requirements. However, it is noteworthy that in cases involving low turnover the value of the transaction remains relevant. The Illumina/Grail case is significant as it assesses the applicability of the EC's guidance on the Art. 22 referral mechanism. [167]

<u>The General Court ruling:</u>

The General Court through a comprehensive interpretation (methodical, textual historical, contextual, and teleological)of Art .22 EUMR observed its application to transactions that were not notified to MS[168] and or other relevant authorities. The case finds that even though the designation of Art. 22 EUMR was for MS lacking a merger control system.[169] The article extends the scope to acquisitions with significant cross-border effects.[170] The General Court recognized the flexibility provided by Art. 22 EUMR allowing the EC to scrutinize concentrations that fall below the threshold requirements of Art. 1 of the EUMR but would still significantly impede competition within the internal market.

Currently, there is an ongoing appeal before the CJEU regarding the ruling and there is a great anticipation regarding the interpretation that the CJEU will provide. The crucial point to note is that concentrations that escape prior assessment due to not meeting merger control thresholds can still undergo ex post on the basis of Article 102 TFEU as affirmed by AG Kokott. (based on the Towercast case which will be discussed) The supplementary application of Article 102 TFEU protects competition by capturing problematic concentrations that do not meet the turnover-related merger controls.

[167] Press release, Mergers: Commission to assess proposed acquisition of GRAIL by Illumina, 20 April 2021,https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5364
[168] Case T-227/21 Illumina v Commission para 90-94 see also para 85-151
[169] Ibid para 97 -116
[170] Ibid

If the Court of Justice of the European Union accepts AG Kokott's conclusion, the scrutiny of merger and acquisition transactions that have the potential of stifling innovation will demonstrate the flexibility of competition rules in response to market dynamics.[171] This would result in the expansion of assessment criteria as highlighted by the General Court's ruling that National Competition Authorities can, refer concentration for review by the European Commission under Article 22 EUMR, even if they do not meet the turn-over related thresholds.

3.6 Comparative Analysis of the Notification Requirement (EU vis -a vis Kenya)

The notification system enables competition authorities to access potentially harmful transactions which escape scrutiny. The concentration needs to fulfil certain conditions including meeting a community dimension criteria, if this is satisfied the merger must then be notified to the competition authority. Article 4 EUMR outlines the conditions necessary for notification to the EC . The notification must comply with Annex 1 of Regulation 802/2004.[172] The EC possesses the competence to review acquisitions even in instances where mergers are outside their jurisdiction as set out Art. 4(5), 9 and Art. 22 EUMR .[173]

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171 Concentration that did not meet merger control threshold can be assessed ex post under abuse of dominance rules AG Kokott in Towercast https://eulawlive.com/concentrations-that-did-not-meet-merger-control-thresholds-can-be-assessed-ex-post-under-abuse-of-dominance-rules-ag-kokott-in-towercast/ <accessed 20/04/2023>

172 https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32013R1269#:~:text=Commission%20Regulation%20%28EC%29%20No%20802%2F2004%20%282%29%20requires%20the,%284%29%20or%20%285%29%20of%20Regulation%20%28EC%29%20No%20139%2F2004.

173 Council Regulation (EC) No 139/2004 of 20 January 2004 On the control of concentrations between undertakings (the EC Merger Regulation) OJ L 24,29.1.2004

The notification procedure for mergers in Kenya is defined in the Competition Act of Kenya and the Competition (General) Rules 2019.[174] According to Section 43, Part IV of the Competition Act the undertaking involved must provide a written notice to the authority in the prescribed manner for a proposed merger. After receiving the notification, the authority has the right to request additional written information.[175] Additionally, under Rule 17 the Competition (General)Rules 2019[176] provides third parties possessing information about mergers implemented without approval are required to notify the Authority about the merger.

The provision requires the undertaking to notify the authority about the merger by submitting relevant information.[177] Notification is compulsory for acquisitions that meet the jurisdictional thresholds. Filing has a suspensory effect meaning that the parties cannot finalize the deal until it is approved by the CAK.[178]This screening will aid the Competition authority in their assessment of the impact of the merger.

The EU has a mandatory notification system where jurisdiction is based on turnover thresholds. However, if a merger does not meet the threshold requirement is not an indication that it will avoid merger control take the Illumina/Grail case . The turnover threshold is designed to govern jurisdiction to determine whether the transaction has a community dimension and is notifiable [179] This dependent

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[174] Legal Notice No. 176 The Competition (General) Rules 2019 of 25th November 2019 (Special Issue Kenya Gazette Supplement No. 191-Legislative supplement No. 63)

[175] Competition Act of Kenya 2010 Section 43 http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2012%20of%202010#part_IV

[176] The Competition (General)Rules -Procedures for mergers determination -Rule 17 Notification of mergers implemented without authorisation.

[177] ibid

[178] ibid

[179] EU jurisdictional notice, paragraph 127
The thresholds as such are designed to govern jurisdiction and not to assess the market position of the parties to the concentration nor the impact of the operation. In so doing they include turnover derived from, and thus the resources

on the threshold requirements if the acquisition did not meet the thresholds the firms were not obligated to notify the competition authorities.

The fact that acquisition by digital firms of startups went unchecked meant that the lack of assessment triggered the EC to finetune its enforcement tool kit to ensure they were notified. The concern stated within this paper was that acquisition by incumbent small startups which fall below the threshold remained under the radar of the EC. The issue of notification is not a new issue as was witnessed in the acquisition of WhatsApp by Facebook in 2014.[180] The consequence of this transaction in the EU triggered some MS to fortify their notification requirements for acquisitions; these MS include Germany and Austria as pointed out previously.

This prompted a proposal in the DMA to make it mandatory for gatekeepers to notify the EC of any intended acquisition. This was to fortify the notification challenge as witnessed by the lack of notification by digital gatekeepers of their acquisition of targets(start-ups) The DMA requires that any gatekeeper that qualifies as an entity regulated under the act is obligated to notify of any concentration in addition to which certain requirements must be fulfilled.

devoted to, all areas of activity of the parties, and not just those directly involved in the concentration. The thresholds are purely quantitative since they are only based on turnover calculation instead of market share or other criteria. They pursue the goal to provide a simple and objective mechanism that can be easily handled by the companies involved in a merger in order to determine if their transaction has a Community dimension and is therefore notifiable.

[180] Case No COMP/M.7217 - FACEBOOK/ WHATSAPP https://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf

3.7 Summary

This section examined the dominance gap, turnover based threshold, jurisdictional challenges, and notification procedures in the EU and Kenya, with a focus on the Illumina/Grail Case. It highlighted the limitation of the EU turnover-based threshold in capturing the dynamics of startups in the digital market and the lack of scrutiny of mergers involving dominant digital gatekeepers by antitrust authorities. The section emphasised the difference in merger control systems of both jurisdictions. The dominance criteria and the abuse of dominance provision was discussed in the EU and Kenya, pointing out the challenges in adapting to digital gatekeepers.

The threshold requirements for merger notifications were explored highlighting the issue of low turnover value or no turnover for startups and the need for a complementary criteria based on the transaction values. Further the need to update the threshold requirement to effectively regulate the digital market and protect competition. The finding in this section illustrated the limitation of the threshold requirement the notification requirement when dealing with killer acquisition transaction. The illumina/Grail case presented an alternative to the EC inability the scrutinize transaction without an EU dimension or where the acquisition falls below the turnover threshold in the EU by relying on the referral mechanism under Art. 22 EUMR. It remains to be seen if the General Courts and the CJEU will uphold the decision set forth in this case.

4.0 COMPARATIVE ANALYSIS ON ENFORCEMENT TOOLS TO CAPTURE KILLER ACQUISITION

This section delves into the enforcement tools employed by competition authorities. The EU leverages the referral mechanism previously utilized by MS lacking a merger control system, along with the newly enacted DMA a comprehensive tool for scrutinizing digital gatekeepers. The focus will be on contrasting these enforcement approaches, identifying their limitations, and exploring potential policy recommendations that could be applicable to Kenya. Both jurisdictions recognise the importance of regulating acquisitions by digital gatekeepers in the digital market with the EU taking the lead in its enforcement efforts to address the gaps left by the antitrust regulations. this section will focus on the referral mechanism, the DMA, and the reintroduction of Article 102 TFEU through the Towercast case as an alternative enforcement approach. The aim is to share knowledge and strategies including capacity building in digital markets. by learning from the EU's enforcement mechanism, Kenya can adopt an informed approach to effectively regulate killer acquisition transactions in the digital market.

4.1 Threshold

The effectiveness of jurisdictional thresholds in addressing killer acquisitions has sparked significant debates. The key question is whether these thresholds enable a thorough merger review process when it comes to such acquisitions. Policymakers are concerned about the possibility of allowing mergers that can lead to serious anti-competitive effects in the digital market without sufficient scrutiny.[181] Moreover, there has been criticism regarding whether the existing merger thresholds are capable of triggering necessary legal standards of review considering the changes in the market structure in the

[181] Ibid (n. 41)

digital sector.[182] Critics have argued for the modification of the thresholds to facilitate scrutiny of mergers specifically within the digital sector, the premise being capturing and prohibiting anti-competitive mergers.[183] The idea lies in amendments necessary to cure competition authorities' inability to scrutinize or investigate the probable impact on future competition. Numerous pushes for the threshold required to be lowered and or include additional transactional value was observed in the move made by Germany and Austria(as highlighted in section 3. 2) [184] Germany and Austria introduced a transaction value test to reign in killer acquisition in the digital sector within their respective jurisdictions.[185] The issue is the appropriateness of the amended value to capture non-notifiable acquisitions.[186]

4.2 Referral Mechanism in the EU

The EU Merger Regulation relies on a turnover-based notification and jurisdictional thresholds which may not effectively capture acquisitions having little to no turnover.[187] The referral mechanism is rooted in the earlier Merger regulation 4064/89[188] and the current regulation 139/2004.[189] The EU merger control system operates under the principle of the one-stop shop rule as outlined in Article 21(2) and

182 Ibid p 67
183 Ibid
184 Ibid (n. 174)
185 Ibid (n. 100)
186 ibid(n. 125)
187 Council Regulation (EC) No 139/2004 on the control of concentration between undertakings [2004]OJ L21/1, Article 1
188 Council Regulation 4064/89 on the control of concentration between undertakings [1989] OJ L395/1
189 ibid(n 153)

(3) EUMR. This provision grants exclusive competence to the EC for reviewing transactions falling within the scope of the regulation. For a transaction to qualify as a concentration within the meaning of Article 3 TFEU and have an EU dimension as defined in Art. 1(2) or 1(3).[190]

The one-stop rule provided NCA with the opportunity to refer transactions without an EU dimension[191] to the EC for scrutiny, or even if they did meet the notification criteria.

Several countries, including the Netherlands, Italy, and Luxembourg relied on Art. 22 as they had no domestic merger control systems at the time of the adoption of the EUMR (4064/89).[192]Notably the EC has changed from its previous practice and now accepts referrals from MS even if the transaction does not trigger national domestic rules. This change was triggered by the gap in the EU merger law leading the Commission to issue guidance in March 2021[193] on the application Art 22 EUMR. Previously, referrals were possible if a concentration without an EU dimension resulted in the creation or strengthening of a dominant position that impeded competition within the relevant territory .[194]

This test can now be found in Art. 22(1)of the EUMR.[195] The EC provides a non-exhaustive list of cases where such referrals can occur. For instance, if the target company is a start-up or a new entrant with significant competitive potential, or if it is considered an innovator according to the Horizontal

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[190] Ibid (n. 180)

[191]Ibid (n. 123)

[192] Václav Šmejkal, ´´CONCENTRATIONS IN DIGITAL SECTOR - A NEW EU ANTITRUST STANDARD FOR "KILLER ACQUISITIONS" NEEDED? InterEULawEast, Vol. VII (2) 2020 DOI: https://doi.org/10.22598/iele.2020.7.2.1 < 09/3/2023>

[193] European Commission, Guidance of 26 March 2021 on the application for the referral mechanism set out in Article 22 of the Merger Regulation to certain Categories of cases. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021XC0331%2801%29 <10/5/2023>

[194] Article 22(3) Regulation 4064/89

[195] Ibid (n. 153)

Merger Guidelines. [196] The enforcement gap has been addressed with the adoption and renewed use of Art. 22 EUMR, which grants jurisdiction to capture cases that previously escaped the EU merger regulation as well as the national thresholds. [197]

Article 22 of the EUMR grants competence and jurisdiction to the EC to apply the EU merger regulation to transaction that fall outside the jurisdictional threshold of EUMR or national thresholds. The General Court interpreted this provision in the Illumina *v* Commission case.[198]

The conditions set out in paragraph 1 of the Art. 22 must be met by the MS when requesting the EC to review an acquisition. These conditions include : (a) the acquisition must affect trade between the MS, meaning the undertaking in a dominant position can influence trade between MS and potentially harm the internal market.[199]

To fulfil the criterion of an acquisition affecting trade between MS, the Court of Justice highlighted several factors that must be considered.[200] Point 14 of the Guidance paper on Art. 22 EUMR emphasizes that there must be ˝discernible influence on the pattern of trade between MS[201]

The Commission applies the standard test used in Art. 101 and Art. 102 TFEU to assess the acquisition´s impact on trade between MS.[202]

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[196] Guidelines on the assessment of horizontal merger under the Council regulation on the control of concentration between undertakings,[2004] OJ C31/5

[197] Ibid (n.

[198] Ibid (n. 114)

[199] Case T-22/97 Kesko Oy v. Commission, ECLI:EU:T:1991:327, para 103 -107

[200] Ibid

[201] European Commission, Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases Brussels, 26.3.2021 C(2021) 1959 final https://ec.europa.eu/competition/consultations/2021_merger_control/guidance_article_22_referrals.pdf

[202] Case C-177/16 AKKA/LAA, ECLI:EU:C:2017: 689 para 27.

The second condition requires that the acquisition (b) threatens to significantly affect competition within the territory of the MS(establishing a prima facie case).[203] The MS bears the burden of proof to demonstrate a genuine risk that the acquisition will have a significant detrimental effect on the competition within their jurisdiction.[204]

The Guidance on Art. 22 referrals provides examples of situations that could strengthen the dominant position, create barriers to entry, and to reduce competition and innovation.

"The creation or strengthening of a dominant position... the elimination of an important competitive force, including of a recent future entrant .... The merger between two important innovators " and the reduction of competitors ability and /or incentive to compete .....including making the entry or expansion more difficult among other things'[205]

The guidance provides practical instructions on how the EC utilizes the referral mechanism outlined in Article 22 EUMR .[206] As a soft law, the guidance is binding on the Commission specifying the types of referral it will encourage and accept from NCA when there are jurisdictional concerns regarding certain concentrations.[207]This demonstrates the commission guidance does not directly refer to killer acquisition but uses a broad term to capture killer acquisition and other categories of situations by using the term "certain categories of cases.[208] This demonstrates the Commission's acknowledgment of potential enforcement gaps in antitrust provisions for future acquisitions.

203 Ibid 107 at p 10
204 Ibid (n. 180)
205 Ibid (n. 145) para, 15
206 Ibid (n 156)
207 Ibid
208 Ibid (n. 59)

Both the EC and the NCA are involved in the assessment process. For the NCA, the assessment is preliminary aiming to determine if a referral is necessary.[209] The EC, on the other hand, plays an important role by investigating the merger after the referral from an MS. In the Illumina/Grail case , the French competition authorities referred the acquisition to the EC, despite it not meeting the national threshold requirements made a referral to the EC even though the acquisition did not meet the national threshold requirements in addition to the fact that no assets were within the EU. The element that was present was the transaction had the effect of affecting trade within the internal market thus approval by the Commission to review the acquisition.

The EC′s guidance on referral under Art. 22 aims to assess concentrations based on certain conditions. These conditions include situations where the concentration strengthens its dominant position by eliminating key competitors (including potential future entrants) or involves a merger between two important innovators.[210] The Commission's Staff working document of 2021,[211] clarifies that ″Not all concentrations with high values or high value to turnover ratio are necessary, especially to transactions that fail to meet the high value or high value to turnover ratio in the digital sector.″[212] The experience in Germany and Austria shows that the new transaction value threshold may not capture all anticompetitive transactions. However, it does not mean that the value of the transaction is disregarded

[209] Ibid (n. 113) the trigger related to the acquisition has an anti-competitive effect on the internal market and can significantly affect trade within the territory of the MS.

[210] Ibid Guidance paper on Article 22 point 15.

[211] Commission Staff Working Document: Evaluation of procedural and jurisdictional aspects of the EU merger control (staff working Document 2021), SWD (2021) final points 132,136.

[212] Ibid

in Art. 22 referrals.[213] In the Illumina/Grail case, the Commission recognized the competitive significance by referring to Grail's turnover, highlighting the USD 7.1 billion-dollar deal value[214]

The Guidance paper recommends the referral of transactions under Art. 22, particularly when the turnover of one party does not accurately reflect its competitive potential.[215] This approach encourages scrutiny of potential killer acquisition and aligns the broad interpretation of the provision.

The reliance on the use of Art 22 allows for the examination of acquisitions that impact competition in the internal market even if the undertaking involved generates limited or no turnover.[216] The practical application enables MS to refer such transactions to the EC requiring them to demonstrate a significant threat to competition within their territory. The effectiveness of the referral mechanism was demonstrated in the Illumina/Grail(M. 10188) case where the merger referral was accepted having failed to trigger the national or the EU reporting obligation since the deal had been concluded.

The General Court in the Illumina /grail case concurred with the Commission's competence to review the acquisition, despite Illumina's challenge.[217] The time limit for the referral process and the absence of the term ‴killer acquisition″ have raised concerns among academic writers. Turgot suggests that this terminology leaves a high degree of uncertainty. However, the Guidance on the referral mechanism brings clarity by an additional six-month period after the completion of the deal.[218] The intentional omission of the term ″killer acquisition″ in the guideline provides flexibility for the EC to address future

[213] Ibid
[214] Ibid points 116,119.
[215] Ibid 109
[216] Ibid Cunningham
[217] Ibid (n. 50)
[218] Ibid

competitive threats. Uncertainty arises regarding the notification and clearance timeline for concentrations.[219] The EC retains the competence to extend the timeline for review if the time period has lapsed.[220] The guidance deliberately includes a provision for the referral to be conducted within a six-month timeframe. Academic literature raises concerns about the unique nature of referrals, like the Illumina/grail case, which deviated from standard antitrust provisions where interim relief is granted during the ongoing investigation and the concentration concludes the deal before the investigation is concluded. The Guidance clarifies that a six-month time limit is appropriate but exceptional situations may arise based on the competition concerns and the potential detrimental effect on consumers.[221]

The Guidance acknowledges that third parties can inform the EC about transactions for referral, expanding the EC's power beyond the traditional two-way street between NCA and the EC. . The guidance on referral works alongside the notice on referral to promote efficiency when dealing with problematic concentrations or acquisitions such as killer acquisition[222]

4.3 Referral Mechanism in Kenya.

Kenya has implemented a referral system similar to the European model in line with its membership in COMESA. Under this, the COMESA Competition Commission serves as a one-stop-shop for mergers that require clearance in more than one Member state. The COMESA regime creates a legal obligation to notify mergers and the jurisdiction extends to transactions that are notifiable in Kenya and other

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[219] Ibid

[220] Ibid

[221] Paragraph 12 of the Commission guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases ´ C/2021/195 para 13, 14.

[222] Ibid (n. 104)

member countries. If the CAK determines that a merger is likely to reduce competition significantly and unfairly in Kenya or any other member country it may request a referral within 14 days after receiving notification of the merger. The Commission makes a final decision on the referral is within 21 days which can either approve or reject the referred merger subject to review under the Competition laws of Kenya.[223] The Commission follows the merger assessment guidelines as a framework for their assessment to include the following conditionality:

(a) The disproportionality and materiality of any potential reduction of competition within that and other Member states(provided that such consideration at this stage will not prejudice any assessment. Whether by the commission or a member's state competent authority of the effect of the merger on competition

(b) The sufficiency of the member state's merger control system, including legal power and expertise in that member states to assess and regulate mergers with a view of preventing SPLC or its equivalent.

(c) The administrative implication of the requested referral including the risk of delay, fragmentation duplication and incoherent treatment by multiple authorities.

While it is interesting that despite these two jurisdictions having an almost similar referral mechanism caution should be exercised when acquisition falls below the national thresholds in such cases public interest argument can be relied upon to protect competition. Previously, acquisitions with low turnover

[223] Section 5.23 -5.30 of the COMESA merger assessment guidelines and Art. 24(8) and 24(9) of the COMESA merger regulations

escaped scrutiny before the updated referral mechanism in the EU was utilized. The aim of the update is to protect consumer welfare and the exploration of other possible alternative measures The Illumina case serves as a valuable example, and the Towercast case discussed in part 4.4 also demonstrates the application of the referral mechanism.

4.4 TOWERCAST CASE (applicability of article 102 TFEU in capturing killer acquisition)

The Advocate General Kokott has expressed the view that Article 102 TFEU can be applicable to the non-reportable acquisition by dominant firms, by proposing that such acquisitions may fall within the scope of Article 102 TFEU. Although the opinion is not binding Upon the CJEU , it carries a persuasive weight. However, concerns have been raised about the potential uncertainty the opinion may create for the business community and its impact on pro-competitive transactions. The Advocate General argues that applying Art. 102 TFEU can effectively protect competition in the internal market, particularly in cases where merger control thresholds are not met.

The CJEU issued its judgment on this case on 16 March 2023[224] providing answers to preliminary questions regarding concentrations, which lacked community dimension and fell below the thresholds for mandatory *ex-ante* control laid down in a Member State.

[224] Case C-449/21 Towercast SASU v Autorité de la concurrence,Ministère de l'Économie ECLI:EU:C:2023:207

The case affirmed that Article 102 TFEU can be applicable to transactions that do not meet the national and EU merger regulations as reiterated by Advocate-General Kokott Opinion on 13 October 2022.[225] The Advocate General highlighted the importance of the primacy of Art. 102 TFEU under EU law by stating that Art.102 TFEU is *"sufficiently clear, precise, and unconditional [226] to have a direct effect. Further neither Article 22 EUMR under the referral mechanism nor the exclusion under Art. 21(1) EUMR prohibits an assessment of a merger post-transaction under Art.102 TFEU.*[227]

The continental can case remains relevant however context must be considered in the Towercast case taking into account the introduction of the EUMR and the limitation it imposes on the application of Art. 102 TFEU. The application of Art. 102 TFEU cannot be identical to its previous scope.

The significance of this case lies in its application of a post-transaction assessment aligning the objective of ensuring competition is protected within the internal market as outlined in the treaties.[228]

Background of the case

In 2017, Towercast, a company operating in the French terrestrial television broadcasting market filed a complaint with the French competition authority regarding the acquisition of control over Itas by TDF Infrastructure Holding S.A.S (referred to as "TDF") on 13 October 2016.[229]

TDF holds a monopoly in the market for terrestrial television broadcasting in France. Following Post - liberalisation in 2004, three companies remained on the market, namely TDF with the largest market share , Itas S.A.S ("Itas") and Towercast. TDF gained control of Itas on October 13, 2016.

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[225] Case C -449/21 Towercast v Autorité de la concurrence,Ministère de l'Économie ECLI:EU:C:2022:777
[226] Ibid (n. 151) para 31
[227] Ibid (n. 151) para 33, 37,38,39
[228] Ibid (n. 151)
[229] Ibid (n. 150) para 17-21.

The complaint alleged that TDF's acquisition of Itas constituted an abuse of dominance and hindered competition in both the upstream and downstream markets for digital terrestrial television. The acquisition resulted in TDF strengthening its position and impeding competition which goes against the provisions of Art.102 TFEU.[230]

The operation of acquiring Itas was below the threshold as expected under Art. 1 of Regulation No 139/2004. As a result, it did not fall within the scope of the mandatory *ex-ante* control regimes of the EU and France.[231] The acquisition was not notified or examined under the merger control procedures.[232] Additionally, it did not trigger the referral procedure under Art. 22 of Regulation No. 139/2004.

The case raised the issue of whether Art. 21(1) EUMR prohibits a competition authority of a Member State from analysing a concentration between undertakings under Art.102 TFEU in a market with a national scope. This question arises when a concentration does not meet the community dimension requirement and falls below the mandatory threshold.[233]

The CJEU ruled that a concentration without EU dimension can be subject to ex-post control by the national competition authorities based on the direct effect of the prohibition of abuse of dominance.[234] The NCA has the authority to assess whether the concentration creates a dominant position and could potentially hinder competition in that market.[235]

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[230] Ibid

[231] Council Regulation (EC)No 139/2004 of January, on the control of concentrations between undertakings (2004)

[232] Ibid (n. 166)

[233] ibid

[234] Ibid

[235] Ibid (n. 150) para 32-37

The CJEU agreed with Advocate-General Kokott's opinion that member states are not precluded from relying on Art. 22 EUMR. At that point, no referral has been made under the procedure outlined in Article 22 EUMR. On November 15, 2017, Towercast lodged a complaint with the French Competition Authority, alleging that the acquisition constituted an abuse of dominance.[236] Towercast argued that the acquisition impeded competition in the wholesale market for digital transmission of terrestrial television services, both upstream and downstream, by significantly strengthening TDF's dominant position.[237] Towercast referred to the Continental can case cited paragraph 26 of the case to support its claim that the acquisition by TDF was an abuse of its dominant position.[238]

On October 16, 2020, the French Competition Authority dismissed Towercast's complaint. stating that although TDF held a dominant position, no abuse could be demonstrated. The referral of the Continental Can case was irrelevant in the context of the merger control system.[239] It emphasized the distinction between merger control and the control of anti-competitive behaviour under Art. 101 and 102 TFEU. Merger control applies to concentration as defined under Art 3 while Art.102 TFEU does not provide a reference to merger control.

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236 Ibid (n. 189) para 17-22

237 Ibid

238 Ibid (n. 189) para 23 see also Case C-6/72 Europemballage Corporation and Continental can Company Inc *v* Commission ECLI:EU: C:1973:22, para 26 where the CJEU held :´´*Abuse may therefore occur if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition, i.e. that only undertaking remains in the market whose behaviour depends on the dominant one.´´*

239 Ibid (n. 189) para 23-29

Towercast appealed the decision of the French Competition Authority before the Paris Court of Appeal which subsequently referred preliminary questions to the CJEU. Towercast relied on recital 7 of regulation 139/2004, arguing that Articles. 101 and 102 TFEU should be applicable. [240]

The question raised through the preliminary ruling.

Is Article 21 EUMR to be interpreted as precluding a national competition authority from regarding a concentration which has no Community dimension within the meaning of Article 1 of that regulation, is below the threshold for mandatory ex ante assessment laid down in national law, and has not been referred to the European Commission under Article 22 of that [regulation], as constituting an abuse of dominant position prohibited by Article 102 TFEU in light of the structure of competition on markets which is national in scope?

<u>The CJEU judgement</u>

The CJEU judgement provides valuable insight into the enforcement of concentrations, highlighting the importance of reviewing their behaviour ex-post even though they were not previously subject to *ex-ante* assessment under the merger regulation.

<u>The Advocates General(″AG″) Opinion</u>[241]

The AG's opinion on the case was significant given the ongoing discussions within the EU regarding non-reportable acquisitions and the uncertainties surrounding these transactions under the merger control regime. The main focus of the case was the interplay between Art. 21(1) EUMR and Art. 102 TFEU. According to the AG, while the EUMR is a secondary law , Art. 102 TFEU holds primary law

[240] Ibid (n. 189) para 38
[241] Opinion of the Advocate General Kokott of October 13, 2022, Case C-449/21, Towercast v Autorité de la concurrence and others, ECLI:EU:C:2022:777 (´´Opinion´´)

status and therefore takes precedence. [242] As a result, Art. 21(1) EUMR does not, inherently prevent the parallel or subsequent application of Article 102 TFEU to a concentration within the meaning of Art 3 EUMR.[243]

The continental judgement should be understood to have broader implications beyond the specific EU merger control system in place at the time that the ruling.[244] It allows for the inference that Art.102 TFEU is applicable to the control of concentrations. Consequently, the judgement retains its legal validity and significance as good law.[245]

A transaction that has been cleared under the merger control rules cannot be qualified as an abuse of a dominant position under Art. 102 TFEU unless the conduct of the concentration goes beyond and constitutes an abuse.[246]

The AG discusses the application of Article 102 TFEU to non-reportable concentrations highlighting the flexible scope of enforcement. However, this reliance on Article 102 TFEU raises concerns of is doubt and uncertainty, particularly in conjunction with the use of Art. 22 EUMR for dominant concentrations.

The case highlights the potential use of Article 102 TFEU for reviewing harmful concentrations that do not meet the notification threshold. Manadrescu argues in his article that Art.102 TFEU can be a useful tool in such cases.[247] However, the practicality of applying Art.102 TFEU is limited to proving that

[242] Ibid , para 29 -31.
[243] Ibid , para 33-34.
[244] Ibid para 53-54.
[245] Ibid para 52.
[246] Ibid para 60.
[247] Daniel Mandrescu, Opinion of AG Kokott in Case-449/21(Towercast):filling gaps in EU merger control and creating new routes for dealing with killer acquisitions through the DMA, 27/October 2022.

an undertaking has a dominant position in the same market or related market of the target[248] along with demonstrating detrimental harm resulting from the concentration.

The AG acknowledges the level of uncertainty surrounding this issue as somewhat inconceivable as stated in para 66 of the opinion:

"In view of the settled case law on the direct applicability of Article 102 TFEU and the judgment in Continental Can, those concerned cannot have developed a belief, in good faith, that that provision would be interpreted differently [in the sphere of merger control].

The Advocate General opinion embraces the use of Article 102 TFEU as a channel of enabling the Competition Authority power to review and prohibit mergers involving Dominant digital firms outside the scope of normal merger control rules.

However, the Opinion does address the concept of killer acquisition or provide guidance on its conditions. Additionally, determining dominance in the digital market is challenging.[249] Nevertheless, Article 102 TFEU offers an alternative pathway for reviewing non-notifiable killer acquisitions, not only in the context of merger regulations but also under the DMA through Art. 14(1) which requires gatekeepers to inform the Commission about their prospective concentration.

Article 14 explicitly covers both notifiable and non-notifiable acquisitions.[250] The Advisory Opinion of the Advocate General carries significant weight especially when compared to Illumina/grail

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https://www.lexxion.eu/en/coreblogpost/opinion-of-ag-kokott-in-case-449-21-towercast-filling-gaps-in-eu-merger-control-and-creating-new-routes-for-dealing-with-killer-acquisitions-through-the-dma/ <accessed 9/02/2023>

[248] Ibid

[249] Report On The Results Of The ICN Survey On Dominance/Substantial Market Power In Digital Markets
UCWG-Report-on-dominance-in-digital-markets.pdf (internationalcompetitionnetwork.org) <accessed 16/5/2023>

[250] Ibid

case(reference section 3.4) . There are differing opinions on the potential impact of the case with some suggesting it could either bridge the regulatory gap or open up new challenges. [251] The purpose of relying on the *ex-ante* merger control regime is to allow Competition authorities to assess transactions in advance and prevent any potential harm. Academic literature highlighted the issue of big tech concentrations escaping scrutiny in the EU and the similar challenges are expected in Kenya regarding the enforcement of digital markets.

4.5 DMA (Digital Market Act)

The DMA complements Competition law by targeting specific business strategies such as self-referencing, distortion of interoperability, data portability and auto/ pre-installation services.[252] Its primary focus is on GAFAM to ensure a fair and competitive environment that promotes innovation, quality of service, and increased consumer choices and particularly benefiting startups.[253] The legal basis for the DMA is Art 114 TFEU which emphasizes the protection of the internal market.[254] It empowers the EC to enforce and maintain checks and balances on the behaviour of digital gatekeepers.[255] The DMA addresses the limitations of traditional competition enforcement in the digital sector, aiming to provide effective solutions.

[251] Gönül Nur Mingsar, Bridging the ´Regulatory Gap´ in the EU Merger Control with Towercast (C-449/21)-A Comparison Between the Member States November 16,2022https://competitionlawblog.kluwercompetitionlaw.com/2022/11/16/bridging-the-regulatory-gap-in-eu-merger-control-with-towercast-c-449-21-a-comparison-between-the-member-states/

[252] Kontosakou,Athena,European Antitrust Enforcement in the Digital Era: How it Started, how it's Going, and the Risk Lying Ahead. Antitrust Bulletin. Dec 2022 Vol 67 Issue 4,P522-535 .14p.DOI: https://journals-sagepub-com.ludwig.lub.lu.se/doi/pdf/10.1177/0003603X22112613 <accessed 29/04/2023>

[253] Ibid

[254] Ibid (n. 117)

[255] DMA section 38(7)

The Act is a comprehensive regulatory framework that systematically regulates abusive behaviours by digital gatekeepers and imposes specific obligations on designated a gatekeeper.[256] The DMA was implemented on November 1, 2022, and it is the first of its kind in the EU .[257] The DMA aims to ensure fair competition and contestability in the digital market.[258] It recognizes that traditional antitrust laws are insufficient for effective regulation.[259] The legal objective of the DMA can be traced in Article 1 of the DMA act as contributing to the proper functioning of the internal market throughout the EU. Contestability refers to the ability of businesses to overcome barriers to entry and expand in the market and challenge gatekeepers based on the merit of their products and services.[260] However, the DMA does not explicitly clarify how it translates ″fairness and contestability ″ into concrete objectives.

The DMA focuses on regulating digital gatekeepers and their anti-competitive practices . The DMA categorically defines gatekeepers(under Art. 3 of the DMA) as having control of major digital platforms that other businesses require to reach their consumers. To qualify as a gatekeeper a platform must demonstrate: [261]

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256 Mariniello, M and C. Martins, ´´Which platforms will be caught by the Digital Markets Act? The ´´gatekeeper dilemma´´ Bruegel Blog, December (2021) <https://www.bruegel.org/blog-post/which-platforms-will-be-caught-digital-markets-act-gatekeeper-dilemma > accessed 27/04/2023

257 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ [2022] L265/1-66

258 Ibid

259 DMA, recital 5 It follows that the market processes are often incapable of ensuring fair economic outcomes with regard to core platform services. Although Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) apply to the conduct of gatekeepers, the scope of those provisions is limited to certain instances of market power, for example dominance on specific markets and of anti-competitive behaviour, and enforcement occurs *ex post* and requires an extensive investigation of often very complex facts on a case-by-case basis. Moreover, existing Union law does not address, or does not address effectively, the challenges to the effective functioning of the internal market posed by the conduct of gatekeepers that are not necessarily dominant in competition-law terms.

260 Ibid (n. 117)

261 DMA, Article 3(1)

(a) Has a strong economic position, significant impact on the internal market, and is active in multiple EU countries.

(b) Has a strong intermediation position meaning that it links a large user base to a large number of businesses,(the firm needs to provide a core platform service that is an important gateway for business users to reach end users

(c) Has (or is about to have) an entrenched and durable position in the market meaning that is stable over time.

There are two important categorizations that digital gatekeepers include qualitative and quantitative criteria. The qualitative criteria are based on assessing the effects on the internal market, the gateway for business users to reach end users as well as the entrenched durability of their position in the future. The quantitative requirement is premised on threshold requirements of core platform services in at least three MS with an annual turnover of at least 7.5 billion EUR over the last 3 years. The average market capitalization of 7.5 billion EUR complementary to the EUMR requires that the turnover be calculated.[262]

The specified qualities play a significant role, and a gatekeeper can challenge the quantitative criteria by presenting arguments to counter the presumption that end-user has no alternatives options and solely depend on their platforms.[263]It is generally agreed upon that the EC can designate a digital gatekeeper based on either the quantitative criteria or through a market investigation that considers quantitative

[262] Ibid

[263] Ibid, see Article 3(5)

factors.[264] However, both criteria have faced criticism for their vagueness and lack of objectivity as the legislator holds discretion in making decisions based on the quantitative criteria.

The obligations imposed under Art. 5 of the DMA are restrictive as they include an ex-ante ″black-list″ that prohibits specific practices to include self-executing prohibition. This means that the limitation is based on the practices that are unfair or harmful. While the prohibited practices are clearly identified it is important to ensure legal certainty for all parties concerned. The obligations outlined in this Article are subdivided into two categories prescriptive and prohibitive[265] Additionally, Article 6 prohibits ″grey list″ behaviour[266] such as (tying practices). The strictness of these obligations is rooted in competition consideration based on the conduct of digital gatekeepers. The prohibitive obligation imposed to ensure that gatekeepers apply fair and non-discriminatory conditions in the digital ecosystem.[267]

The DMA will be a global benchmark for regulating the impact of digital gatekeepers on competition the Act will be referenced and mirrored by different legal systems.

It serves as a complementary tool to the existing competition rules especially Article 102 TFEU by prohibiting exclusionary practices and the Commission authority will no longer be limited to addressing concerns related to small or zero-income targets. The EC′s guidance on Article 22 read in

[264] Article 3(2),(4)(6) as well as Article 15 DMA
[265] Akman, P , Regulating Competition in digital platform market: a critical assessment of the framework and approach of the EU Digital Market Act . European Law Review, 47(1). p .85-114 https://orcid.org/0000-0001-5796-8598 < Assessed 2/05/2023 >
[266] Ibid
[267] Ibid

conjunction with the gatekeepers′ obligations suggests that the EC will not hesitate to review acquisitions by digital gatekeepers.[268]

To qualify as a digital gatekeeper, three specific requirements must be met according to Article 3(1) and 3(2) of the DMA.

The DMA's rules prohibit gatekeepers from using exclusionary leveraging strategies which to expand their dominance into new markets through the acquisition of a company operating in a neighbouring market. [269] One major criticism of the DMA is the challenge of accurately designating gatekeepers as those designated as gatekeepers are not obligated to comply with the specified obligation. Additionally, if a gatekeeper disputes its designation, it can argue that the EC failed to satisfy the conditions outlined in Art. 3(8) of the DMA citing preliminary findings from the market investigation.[270] The DMA overlooks the horizontal effects in the evolving digital and lacks provisions for addressing them The Commission should update both its horizontal and non-horizontal guidelines to include theories of harm specific to digital markets. Having earlier expressed the challenges faced by competition authorities. [271] A regulatory framework and structural solution are needed to address the platform′s infrastructure, privacy concerns, and compatibility standards on the expected information required from the gatekeepers.

[268] Ibid (n. 206)
[269] Ibid
[270] Cristophe Carugati, The Difficulty of designating gatekeepers under the EU digital Markets Act , 20 February 2023 https://www.bruegel.org/blog-post/difficulty-designating-gatekeepers-under-eu-digital-markets-act <accessed 23/04/2023>
[271] Ibid

Under Article 12 of the DMA, gatekeepers are required to notify authorities of all their mergers and acquisitions, an important component in learning how platform markets operate, and applicable theories of harm.[272] This promotes and creates an avenue for greater transparency and allows for a better understanding of how digital platforms operate and the relevant theories of harm. Additionally, Article 14 of the DMA imposes an obligation to the EC to inform competent authorities in MS about the notified mergers.[273] NCA can then examine the mergers based on the information provided by the EC, following the procedure outlined in Art. 22 of the EUMR.

4.6 Digital Market Act in the EU versus merger control regime in Kenya

The DMA is a significant legislation that aims to regulate the behaviour of digital gatekeepers, by defining their status, obligation, and enforcement measures. It specifically targets select digital platforms and governs the digital economy as a whole. The Kenya the merger control system main aim is to ensure that all transactions do result in anti-competitive practices by enhancing competitive markets and promoting consumer welfare. The Kenya Competition Act along with the Merger Threshold guidelines rules 2019[274] governs the conduct of all companies within its territory . In contrast the DMA focuses on regulating the conduct of companies designated as digital gatekeepers in the EU. The DMA introduces a prescriptive system to prohibit the conduct of digital gatekeepers

[272] Ibid 206
[273] DMA, Article 14(4)
[274] Ibid

while the Competition Act of Kenya controls abusive conduct by companies in a broader sense. The DMA is prescriptive while Kenyan merger control is more prohibitive in nature.

The DMA imposes strict obligations on digital gatekeepers, while the Kenya merger control system targets abuse of dominance and exclusionary conduct of the undertaking. Unlike Kenya's regime, the DMA prioritizes contestability and fairness rather than exclusionary behaviour. Notably, the recent amendment to Kenya's Merger Control regulation indicates an increased ability to capture low turnover transactions.

4.7 Limitation of Enforcement Provisions

There are several concerns regarding the limitation and uncertainties surrounding the referral mechanism and the DMA as an enforcement tool. The DMA's obligations are burdensome and interventionist as they primarily serve the Commission's procedural interests. The level of encroachment and the extent of liability imposed by the DMA seems excessive considering the interventionist rationale under Art.102 TFEU. However, these restrictions are deemed necessary to ensure the proper functioning of the EU digital markets as intended rather than being based on business users' natural entitlement to business practices that foster competition.[275] The obligations imposed by the DMA do not create an entitlement that enables business users to demand certain conducts from gatekeepers that go beyond the accepted boundaries such as freedom to contract.

The DMA by imposing selective obligations and prohibitions leads to arbitrary distinctions and treats similar companies differently. The blanket prohibition limits the gatekeeper's right by failing to balance legitimate reasons and prohibiting pro-competitive practices. Additionally, the guidance on referral

[275] Oles Andriychuk, Do DMA obligations for gatekeepers create entitlements for business users?, *Journal of Antitrust Enforcement*, Volume 11, Issue 1, March 2023, Pages 123–132, https://doi.org/10.1093/jaenfo/jnac034 <accessed 17/05/2023 >

being a soft law raises concerns of legal certainty .[276] Additionally, there is a need for clarification on the legal test scope. [277]

Since the DMA rules are intentionally designed to be discretionary and exclusive to the EC their enforcement cannot be extended to NCA or private parties unlike the responsive nature of post rules.[278]

4.9 Infringement on Freedom To Conduct Business.

Notably while the paper has demonstrated the negative effect that killer acquisition has on competition it is important to consider the rights for GAFAM companies guaranteed under Art. 16 of the Charter of Fundamental rights of the EU which states that 'the freedom to conduct business is in accordance with union law and national laws and practiced is recognised.' This legal right which digital gatekeeper are entitled to enjoy as well as the freedom to contract which can only be achieved in a system ensuring effective competition within the internal market is guaranteed. The CJEU in the Nold, Kohlen and Baustoffßhandlung v Commission highlighted the fact that while the right to free pursuit of its business activities is protected it is not an absolute right and is subject to limitation.[279] According to Eduardo, the restriction of this right by MS and or the EC when acting within the scope of EU law must be justified

[276] Nicholas Levy, Andris Rimsa & Bianca Buzatu, 'The European Commission's New Merger Referral Policy: A Creative Reform or an Unnecessary End to 'Brightline' Jurisdictional Rules?' (2021) 5 Eur Competition & Reg L Rev 364 < accessed 18/05/2023>

[277] https://competitionlawblog.kluwercompetitionlaw.com/2021/04/20/how-illumina-ting-the-eu-merger-regulation-and-the-brutal-operation-of-power-under-article-22-eumr/ <accessed 18/05/2023>

[278]ibid (n. 273)

[279] Case 4/73 Nold, Kohlen and Baustoffßhandlung v Commission, ECLI:EU:C:1974: 51:491: See also Case C- 240/97 Spain v Commission ECLI: EU:C: 1999:479 where the court stated that the freedom to conduct business cannot be limited in the absence of community rules impose specific restrictions in that regard.

and proportionate in light of an objective which is recognized as legitimate under EU law. Further the right should be preserved and free from interference with regulatory interference require justification[280]

4.8 Policy Recommendation

The policy recommendation applies specifically to Kenya and focuses on regulating the behaviour of digital gatekeepers through an effective enforcement mechanism provided by the DMA. Implementing the DMA framework could potentially address the gaps in the antitrust provisions allowing the antitrust regulator to intervene swiftly due to the strict obligation placed on the gatekeepers. However, it is crucial to consider the administrative cost, time efficiency, and concerns regarding regulating digital gatekeepers. This consideration is particularly important when comparing it to the CAK´s approach in assessing killer acquisition transactions. To ensure effective oversight of digital gatekeepers and the rapidly growing digital economy, the adoption of the legislation should encompass not only GAFAM but also other relevant entities. This is so that the CAK is not overwhelmed in its capacity to oversee digital gatekeepers.

Furthermore, the CAK should explore the asset, the purchase price, and turnover of the merging the parties within the current threshold along with reviewing the required information for transactions involving digital gatekeepers. This will enable the CAK to gain a comprehensive understanding and make an informed assessment of such acquisitions.

[280] GILL-PEDRO, Eduardo, *Freedom to conduct business in EU law : freedom from interference or freedom from domination?*, European journal of legal studies, 2017, Vol. 9, No. 2, pp. 103-134 - https://hdl.handle.net/1814/46070

In terms of information requirements for merger filings, the burden of proof should shift to the digital firm compelling them to demonstrate the pro-competitive nature of the acquisition this approach is essential for the assessment process conducted by the CAK.

The response approach in terms of information that the CAK would require for parties filing a merger should shift the burden of proof on the digital firm by showing the pro-competitive nature of the acquisition. This instrument is in terms of the assessment requirement that the CAK would have. Additionally, the assessment of horizontal and vertical acquisition needs special attention, especially in terms of the market behaviour of incumbents in Kenya.

5.0 CONCLUSION

In Conclusion, this research delved into the concerning issue of killer acquisition transaction within the digital ecosystem and implication for competition regulation in both the EU and Kenya . These acquisitions pose risks to consumer welfare and innovation, demanding a stronger focus on prohibitive , protective, and prescriptive measures by competition regulators.

Firstly, the essay critically questioned the concept of killer acquisition, the challenges in applying a suitable theory of harm and the issues related to market definition. While there are numerous definition of killer acquisition, it was found that the adaptability of the definition in section 2 allows for interpretation and adaptability. Secondly the suggestion is for competition authorities to conduct a comprehensive market studies to gain a better understanding of the novel theories of harm specific to digital economy and the effects on the digital market. Given the dynamic nature of digital markets, traditional frameworks and traditional theories of harm are inadequate. The narrow definition of a market under the current EU competition framework should be expanded considering interrelated market realities within the digital ecosystem as emphasized by relevant EU cases law on market definition.

Thirdly, the research highlighted the outdated nature of antitrust provisions when applied to killer acquisition transactions due to the unique nature characteristics of digital markets. Establishing dominance becomes challenging due to the multifaceted nature of the digital market and the ability of digital gatekeepers to adapt and maintain their position within the digital market. The difficulties identified in relying on Article 102 TFEU to address the dominance gaps arise from the dynamic characteristics of the digital market, making it arduous to prove dominance as discussed in the relevant case law. However, the Towercast case emphasized the importance of Article 102 TFEU as an alternative enforcement tool for addressing killer acquisition transactions falling within its scope.

Additionally, there has been an ongoing debate on the effectiveness of jurisdictional thresholds in capturing killer acquisition, with concerns raised about allowing mergers that can result in serious anti-competitive effects without sufficient scrutiny. The findings indicate a procedural defect in the threshold requirement even if they are amended doubts remain regarding the appropriateness of the revised value to capture all non-notifiable acquisitions further a legal certainty issue between EU criteria and Member state criteria. The Illumina/Grail case demonstrated the effectiveness of the referral mechanism when the threshold and notification criteria were insufficient in capturing killer acquisition proving there is no need to amend the jurisdictional thresholds.

Fourthly the Towercast case shed light on the applicability of Art. 102 TFEU as a potential ex-post alternative tool to counter killer acquisition strategies based on abuse of dominance emphasizing its significance in protecting competition. This is particularly relevant in cases where acquisition fails to meet the merger control threshold. Furthermore , the DMA serves as a complementary tool to competition provision aiming to enable the EC to strategically select obligations that promote proactive competition policy on a case-by-case basis. Gatekeepers are held accountable for non-compliance with specific conduct mandated by the Act and are required to inform the EC of their behaviour allowing for monitoring of their merger and acquisition activities .

The DMA takes a punitive approach, emphasizing non-compliance and imposing interventionist obligation to serve the EC's interest and ensure effective functioning of the EU digital market within the internal market. The DMA is a unique enforcement tool, which employs a more regulatory dialogue that includes enforcers, gatekeepers, NCA, and third parties with legitimate interest to provide their input and information to the enforcer.[281] This approach is strategic and fundamentally different from the strict competition law with a broader scope as it decentralizes enforcement with ex-post rules. The DMA presents an opportunity for Kenya to encourages proactive governance and establishing long term digital policies aligned with the strategic interest of Kenya and complementary to the existing merger control regime.

[281]Ibid (n. 273)

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