Killer-acquisitions by the big tech giants and the EU's merger control in a fast-evolving digital era

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Abstract

This research paper examines the European Union's merger control regime and its efficacy in addressing the killer acquisitions by big tech firms in the fast-evolving digital sphere. It investigates the legal framework, competition policy objectives, and more importantly the impact of the digital sector on EU competition policy. Furthermore, it critically analyses the killer acquisitions by the big tech firms, and their collateral impact on innovation and the EU competition policy, concerns about anti-competitive conduct, and examines the strategies employed by big tech firms that have posed a huge challenge to the EU's competition policy. Primarily focusing on investigating the challenges posed to the EU merger control regime by the fast-evolving digital sector, including the notification requirement and the discourses around the transactional value that is opposed to the traditional EU merger control approach. The research inquiry concludes by underscoring the growing need for ongoing assessment and reform initiatives to ensure fair competition in the digital sphere.

Keywords:

Killer Acquisitions, M&A, EU Merger Control, Big Tech Giants, Digital Market, Competition Policy, Antitrust Laws, Regulatory Intervention, Distorting Innovations, Merger Thresholds, Transactional Value

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Abbreviations

DMA – Digital Markets Act

EU – European Union

EC – European Commission

ECJ – European Court of Justice

EUMR – European Union Merger Regulation

FTC – Federal Trade Commission (US)

GAFAM – Google (Alphabet Inc), Apple, Facebook (Meta Inc), Amazon and Microsoft

M&A – Mergers and Acquisitions

P2C – Platform-to-Consumer

TFEU – Treaty on the Functioning of the European Union

OECD – Organization for Economic Co-operation and Development

1. Introduction

In recent years, the world has witnessed an influx of big tech giants' dominance in the global economy in different aspects. These companies, with their enormous financial resources and innovative technologies, have been able to reach an unprecedented level of market dominance in recent years and various sectors, including i.e., e-commerce, social media, and digital advertising. Nonetheless, serious concerns have been raised about the strategies used by these big corporations to maintain their market dominance, including certain controversial practices of acquiring a potential competitor to distort market competition, which is widely known as '*killer acquisition*.' The term 'killer acquisition' was initially coined by the well-renowned legal scholars and economists, *Fiona Scott Morton* and her co-author *Herbert Hovenkamp* in 2013[1] which refers to the act of acquisition of small start-ups by big corporations, with the ulterior intent of neutralizing future competition. Such acquisitions are often made before the target start-ups have an opportunity to develop their products fully or more likely before establishing themselves as a viable competitor in the marketplace. Such predatory and destructive practices have raised significant concerns about the impact it has on innovation and competition in the digital economy.

1.1 Background and significance

The EU's merger control regime is designed to prevent anti-competitive practices and promote competition in the EU's single market.[2] The European Union (EU) has been at the forefront of regulating the digital economy and addressing the issues surrounding big tech firms' controversial practices. Furthermore, the more recent Digital Markets Act (DMA)[3] primarily deals with regulating the conduct and market dominance of large online platforms, widely known as gatekeepers, in the European Union's digital single market. As intended by the EU, primarily to

[1] Herbert Hovenkamp. *Antitrust and Platform Monopoly*. The Yale Law Journal (2021)

[2] Wish Richard and Bailey David. *Competition Law* Oxford University. Press 9th ed., (2018) p. 871-872

[3] See, Article 12 of the DMA, that obliges, predominantly targeting the big tech firms (GAFAM) provide services in the digital sector, to notify any mergers or acquisitions irrespective of whether national or EUMR merger turnover thresholds are met

create a safer digital space, preserve and protect the fundamental rights of all users and more importantly, establishes a level-playing field that fosters innovation, growth, and competitiveness – both within the EU single market and globally. However, with the fast-evolving digital sector, the existing merger control framework is facing significant challenges. Thus, it begs the question of the efficacy of the EU's merger control regime in light of such recent developments.

The above development is of great significance particularly, in today's fast-evolving digital context. This cuts across many aspects of society and how humans interact with each other, which has a far greater impact than a few decades ago. In this context, as the trend of evolving market dominance by the big tech corporations continues to grow, so do the concerns over their considerable impact on society including competition[4] and innovation in the EU's single market.[5] The acquisition of tech start-ups by such big tech firms has been a common practice, although there is growing concern that these acquisitions may be used to eliminate competition and maintain their market dominance. Accordingly, these so-called *'killer acquisitions'* can potentially hinder innovation and accordingly severely restrain and limit consumer choice, which impacts the EU trading block's economy as a whole.

The EU's merger control regulation is designed to control and prevent these 'killer' acquisitions[6] from occurring whilst ensuring healthy competition is maintained in the EU market. As the global digital sector continues to evolve[7] and grow exponentially,[8] the EU institutions need to keep pace with these emerging and evolving challenges that come with the rapid digital transformation and therefore devise its regulatory intervention accordingly. Critical research on this topic is crucial to identify specific ways in which big tech firms may be crafting killer acquisitions to maintain their market dominance in the EU.

Accordingly, critical research on this topic can help to identify potential gaps in the EU's merger control regulation and provide potential insights into how it can be further improved and strengthened to better address the challenges posed by the digital sector. Furthermore, by

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[4] Florian Ederer, *Does Big Tech Gobble Up Competitors?* Yale Insights (2021)

[5] Peter Alexiadis, & Zuzanna Bobowiec, *EU Merger Review of 'Killer Acquisitions' in Digital Markets Threshold Issues Governing Jurisdictional and Substantive Standards of Review*. (Indian Journal of Law 2020). p. 67-68

[6] Colleen Cunningham, Florian Ederer and Song Ma, *Killer Acquisitions.* Vol. 129, Journal of Political Economy (2018)

[7] UNCTAD. *Digital Economy Report*, 2019 p. 38.

[8] UNCTAD. *Digital Economy Report*, 2021 p. 29-67

understanding the mechanisms behind these acquisitions, policymakers can potentially develop effective counter-measures and deterrent strategies to control and prevent them from occurring whilst enabling to promote competition in the EU market.

1.2 Purpose and research question

The purpose and objective of this research essay, firstly, to provide a comprehensive understanding of the concept of killer acquisitions, primarily in the digital sphere and critically analyse the different strategies that are employed by big tech corporations to maintain their market dominance. Secondly, the impact of such killer acquisitions on innovation and EU-based tech startups will be analysed and evaluated through the lens of the EU's merger control regime, known as the European Union Merger Regulation (EUMR). This will include examining the EU competition policy and the existing EU merger control framework and its efficacy, particularly in addressing killer acquisitions in the digital space.

Finally, this will also help identify the policy gaps, and the challenges faced by the current EU's merger control regime in addressing so-called '*killer acquisitions*' from a legal point of view that will help further improve the efficacy of the merger control regime. Accordingly, this research inquiry endeavour to contribute towards the ongoing policy discourse around the topic of regulation of big tech corporations that impact tech startups in the EU trading block in the digital economy. The findings of this research study will undoubtedly provide valuable insights into the effectiveness of the existing EU merger control framework in addressing the policy gaps in dealing with the emerging challenges posed by big tech corporations with their controversial killer acquisitions. Therefore, this research paper will be of interest to many stakeholders including but not limited to policymakers, regulators, and academics interested in the regulation of big tech firms, merger control, and the digital economy.

To achieve the above-stated purpose and objectives the following research question will be investigated and addressed; *to what extent is the European Union's merger control framework designed to prevent killer acquisitions by the big tech firms in the digital sector?*

1.3 Scope and delimitation

This research inquiry investigates the realm of EU merger regulation, both within and beyond the scope of competition policy, with a precise focus on addressing the challenges posed by so-called 'killer acquisitions'. The aim of this study, includes, shedding light on the challenges encountered by the European Union Merger Regulation (EUMR) and assessing the impact and the consequences of these challenges in this digital era. This research inquiry explores the recent approaches adopted by the European Commission and the EU member states to tackle these foreseeable issues. Moreover, this study delves into the impact of the EU merger control regime and the impact of the practices of prominent American technology companies that have on EU tech startups. This will effectively enable us to critically review the implications of killer acquisitions and the impact it has on innovation and competition in the EU trading block, specifically focusing on the digital market, and how competition law and related policy should respond to these challenges. Furthermore, to provide some context for the reader's better comprehension, it will be looked at how the legal framework for merger control[9] in the European Union whilst providing an outlook into the American legal framework on competition policy and how it differs in terms of its effectiveness in preventing killer acquisitions by big tech firms.

It is important to note that this study however does not investigate the details of identifying potential competitors, which is out of scope and similarly, so does exploring the underlying reasons for European tech startup companies' decisions to pursue a selling strategy. Finally, this thesis does not provide a comparative study nor a direct comparison between the US antitrust laws and the EU merger control. By addressing some of the related key issues, this study endeavours to contribute towards an inclusive understanding of the challenges met by the EUMR, the impact and the consequences of 'killer acquisitions', and the contemporary measures taken on-board by the European Commission to confront these issues, whilst taking into consideration the broader influence and ramifications of the US legal framework on the practices of the global tech giants.

[9] Iannis Kokkoris and Howard Shelanski. *EU merger control- A legal and economic analysis.* Oxford 61 University Press (2014) p.17.

1.4 Materials & Methodology

In view of investigating the degree of effectiveness concerning the European Union's merger control framework in preventing killer acquisitions by big tech firms in the EU digital market, the traditional legal-dogmatic method has been employed. Acknowledging the subject matter which is a complex intersection between legal, socio-economics, and political considerations. Legal-dogmatic method, in certain contexts, has its limitations, particularly in its reliance on textual analysis and its impending to overlook the social and economic contexts in which the law operates. For this reason, it can be argued that it is appropriate to use a traditional qualitative research approach. However, it also could be argued that selecting a suitable method of doctrinal legal scholarship that is not only able to address the research question but more importantly to be able to justify and reflect the normative complexities, offers a detailed and clear outlook on how to deal with conflicting arguments, is key for a successful research inquiry. Accordingly, the legal-dogmatic method, a widely accepted method in legal scholarship,[10] primarily deals with analysing and interpreting the legal content, scripts and sources of law i.e., legislation, statutes and case law, that facilitates developing a coherent and consistent set of legal rules with a focus on explaining and resolving legal challenges around this subject matter by applying the relevant principles and rules originated from the respective legal text to it.[11]

Accordingly, the legal dogmatic method will be supplemented by a case study analysis. The legal dogmatic methodological approach offers responds to the research questions presented above, by critically reviewing the sources of the law, including statutes, legislations, conventions, and EU regulations.[12] This approach is further outlined as it facilitates this research inquiry with a systematic explanation of the concepts, rules, and principles overseeing the legal field concerning EU competition policy, while facilitating analysing of the gaps in the prevailing law that enables better legal reasoning.[13] Moreover, this method's doctrinaire approach allows scholars and researchers to examine how the legal doctrine and actions mould within the legal system.

To examine how to prevent 'killer acquisitions' through European merger control instruments, a detailed literature review will be conducted on '*killer acquisitions*', particularly on small start-ups

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[10] Aleksander Peczenik. *Legal doctrine and legal theory.* (ed). Roversi, Corrado, (2005) p. 814-840
[11] Ibid
[12] Jan Smits. *What Is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research*. Cambridge University Press, (2017)
[13] Ibid p 5-6.

by tech firms. This will include an analysis of the EU merger control regulations, European competition policy, and US antitrust laws concerning the digital sector. The traditional legal dogmatic method will be used to analyse the European mergers regulations, including Article 102, the Treaty on the Functioning of the European Union (TFEU),[14] the 4064/89 of 21 December 1989 and 139/2004 of 20 January 2004. The former is no longer in force, but it has played an important role in the development of the EU's current merger control framework, while the latter is currently in force and has recently undergone changes, the application of Article 22 in particular. The EU Merger Control and European Commission's (EC) approach, includes the broader objectives of the recent European Union initiative of the Digital Markets Act.[15] This concerns where, the EU primarily intend to take on the big tech giants, which includes creating a safer digital space preserving and protecting the fundamental rights of all users & establishing a level-playing field to foster innovation, growth and competitiveness – both in the EU single market and globally.

Furthermore, the study approach as explained above, will examine the American Antitrust law to provide some context to the reader, including the Sherman Antitrust Act (1890)**[16]** and its amendments, Clayton Antitrust Act (1914), and the Federal Trade Commission Act. This would provide not only a better understanding as to how the '*Big Tech'* companies grew to such a large extent, particularly on authorities' watch but also provide an American outlook to the reader on this topic, as most of such big-tech firms are based out of the U.S (in Silicon Valley). Sherman Antitrust Act for example, on the contrary, necessitates a rather higher level of standard of evidence of collusion towards restraining trade that hinders competition or for that matter monopolising the market.[17] This will be supplemented by critical research to investigate the broader context of the related problems of killer acquisitions by the big tech firms in this digital sphere[18] by critically analysing the applicable regulatory regimes, and legal tools that will be supplemented by journal articles on the huge number of tech start-ups acquired by such firms including in the EU, and the potential impact that it has on market competition.

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[14] Treaty on the Functioning of the European Union (TFEU), Article 102

[15] Digital Markets Act (DMA), 2022

[16] Sherman Antitrust Act (1890)

[17] Ronald Coase. *The Firm, the Market, and the Law*, University of Chicago Press (1990), p. 117-118.

[18] Tim Wu. The Curse of Bigness: *Antitrust in the new gilded age*. Colombia Global Rep. (2018), p. 16-21

1.5 Outline

This research inquiry begins with the introduction of the EU's merger control regime in line with the EU's competition policy, with an exposition on the same whilst problematise the need to evaluate the European Union's merger control framework that deals with preventing killer acquisitions by the big tech firms that impacts the EU tech startups. In Chapter 02, the legal framework and enforcement gaps in the digital sphere are discussed, with an introduction to competition policy objectives and the EU regulatory interventions whilst providing an overview of the EU Merger Control regime and its significance in the context of the digital sector. In Chapter 03, the concept of killer Acquisition and the conduct of the big tech giants are discussed in the context of the digital sector, whilst providing some context to the reader, particularly concerning the rise of large US corporations and their anti-competitive practices from the standpoint of the Antitrust Laws. Finally, in Chapter 04, the EU Merger Control is discussed in detail from an evolving digital sector perspective whilst providing some context into the contemporary discourse around notification requirements, merger thresholds, and the dilemma faced by the EU member states, policymakers, and competition authorities.

2. Legal Framework and enforcement gaps in the Digital sphere

Introduction

The legal framework and its key policy objective of the EU competition policy,[19] focuses primarily on promoting competition within the European Union single market in view of attaining a level playing field for all companies, which ensures consumers benefit from a wide choice of goods and services available to them and more importantly, at competitive prices.

2.1 Competition policy objectives & EU regulatory intervention

Accordingly, the EU competition policy is essentially based on the provisions of the Treaty on the Functioning of the European Union, in particular, the provisions of Articles 101 and 102. Article 101 of TFEU, essentially prohibits anti-competitive practices, i.e., agreements between undertakings, including cartels and other forms of similar practices that restricts or potentially hinders or distorts competition. On the other hand, Article 102 of TFEU prohibits the abuse of a dominant position in a market,[20] that includes practices such as predatory pricing, exclusionary practices, and other forms of anti-competitive conduct.[21]

The European Commission, as the executive arm of the European Union is responsible for enforcing EU competition law. Moreover, as per TFEU, it has the power and the authority to investigate suspected breaches of competition law, that includes i.e. to conduct market surveys and studies, and taking necessary enforcement action against companies found to be in contravention or suspected to be in breach of competition law, to imposing fines and even requiring the divestiture of assets as it deems fit. In addition to the TFEU, the EU also has adopted several other legal instruments, i.e., regulations and directives to support and strengthen the implementation of its competition policy. The EU Merger Regulation, for example, provides a framework for the review of mergers and acquisitions (M&A) that may potentially have anti-competitive effects within the

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[19] Wish Richard and Bailey David. *Competition Law* (2018 Oxford University. Press 9th ed., p. 871-872

[20] Luis Cabral. *Standing on the Shoulders of Dwarfs: Dominant Firms and Innovation Incentives*. CEPR Discussion Paper (2018), Paper No. DP13115

[21] Treaty on the Functioning of the European Union (TFEU), Article 102

EU. The Directive on Antitrust Damages Actions, for instance, aims to enable private actions for damages by those victims as a result of anti-competitive behaviour.[22] Furthermore, EU competition policy is also steered by case law, which provides guidance and helpful insights into how the provisions of the TFEU should be interpreted and applied in certain situations and specific circumstances. Some of the significant cases that will be reviewed in this research inquiry include but are not limited to the cases of Microsoft, Apple or Intel. The EU case against the tech giant Microsoft is a very significant milestone for many reasons, but more so from a competition law standpoint. In 1998, when the European Commission opened an investigation into Microsoft's business practices, where the Commission in 2004 found that Microsoft, had abused its market dominant position in the PC operating systems sector, primarily by bundling its flagship Windows Media Player software with its (Windows) premier operating system whilst not providing any sufficient information to other developers making sure their products could still run through smoothly with it Windows platform.[23] In this case, the Commission found Microsoft breaching Article 102 of the Treaty on the Functioning of the European Union, which prohibits the abuse of a dominant market position.[24] Accordingly, the ruling of the case had ordered Microsoft to offer the consumers a version of Windows without its Media Player and essentially to disclose specific technical particulars to its industry competitors. Although Microsoft initially appealed the decision, however in 2007, the European Court of First Instance, upheld the Commission's decision, and accordingly, Microsoft was forced to pay a mammoth fine of €497 million for breaking the competition policy at that stage.[25]

Furthermore, in 2009, the European Commission unveiled yet another investigation, this time targeting Microsoft's business practices, which concerns the bundling practices of its popular browser (Internet Web Explorer) with its Windows operating system. In this case, the executive arm of the EU, the Commission determined that Microsoft's actions had yet again breach EU competition policy, in particular Article 102 of the Treaty on the Functioning of the European Union, which explicitly prohibits the abuse of a dominant market position.

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[22] Jacques Crémer, Yves-Alexandre Montjoye and Heike Schweitzer. *Competition policy for the Digital Era*. European Commission (2019), p.110-112.
[23] Joanna Morris, *Microsoft: Paying the Price*. (Practical Law25 September 2007)
[24] Commission Press Release. *Commission concludes on Microsoft investigation, imposes conduct remedies and a fine*. EC Brussels. March 24, 2004
[25] Microsoft v Commission T-201/04

Accordingly, the Commission had ordered Microsoft Incorporation to facilitate (i.e. alternative browser options on screen), more choices to European users of Windows that will enable consumers to choose between different web browsers. However, Microsoft again appealed the above decision. Nonetheless in 2012, yet again the European Court of Justice (ECJ) not only upheld the Commission's findings but also imposed a mammoth fine of €561 million on Microsoft Incorporation at that stage nearly a decade ago, for the reason of breaching competition policy and failing to comply with the earlier order to provide a browser choice on the screen. The Microsoft cases are evidential and more importantly momentous in establishing the EU's power and authority in regulating and enforcement of competition policy particularly directed at the technology sector targeting the big tech companies.[26] This set an imperative precedent for future cases involving dominant tech companies.

In the case of Intel, dealing with yet another tech giant, the European Commission found that Intel had violated EU competition policy rules by violating Article 102 of the Treaty on the Functioning of the European Union, which prohibits the abuse of a dominant market position by involving in anti-competitive market behaviour. The case involved several accusations, that includes engaging in loyalty rebates and exclusivity agreements that had aimed to exclude competitors from the relevant market for computer processors.[27] In 2009, the European Commission penalized Intel with a €1.06 billion fine for abusing its market dominant position for computer processors, contravening Article 102 of the Treaty on the Functioning of the European Union, which prohibits the abuse of a dominant market position.[28]

The Commission essentially determined that Intel had engaged in several anti-competitive practices, including providing rebates to CPU manufacturers on the specific condition that they purchase all or most of their components (computer processors) from Intel, and rewarding computer manufacturers to certain terms i.e. delay or cancel the launch of certain products that used computer processors, and that Intel had made direct payments or rewards to major retailers to stock only computers with Intel processors. Taking all these material facts into consideration, the Commission found Intel in breach of the Article 102 of the Treaty on the Functioning of the European Union.

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[26] Commission Press Release. *Antitrust: Commission fines Microsoft for non-compliance with browser choice commitments*. EC Brussels. March 06, 2013

[27] Miroslava Marinova. *The EU General Court's 2022 Intel Judgment: Back to Square One of the Intel Saga*. European Papers - A Journal on Law and Integration (2022)

[28] European Commission, *Press Corner.* European Commission (2020)

In recent developments, in 2023 Apple Inc, yet another American tech giant involving EU competition policy infringements. The European Commission observed that Apple Inc. had violated Article 102 of TFEU, by abusing its market dominant position for music streaming apps through its own ‘App Store’ practices. In this case, the Commission found that Apple's App Store policies, which essentially required developers to utilise Apple's in-app purchase system and also pay a 30% commission, which violate the EU competition policy. Furthermore, the Commission found that Apple's business practices and related policies effectively prevented developers in the EU from informing users of alternative purchasing options outside of the app, which further hinders competition with the EU.[29] Accordingly, the Commission had ordered the trillion-dollar valued tech giant[30] Apple In to discontinue its anti-competitive practices and imposed a fine to the tune of €1.1 billion.

2.2 Overview of the EU Merger Control Regime

The EU’s merger control regime can be regarded as an essential factor and a vital legal instrument that facilitates the upholding of EU competition policy. It is primarily aimed at deterring and preventing anti-competitive mergers and/ or acquisitions that could potentially hinder or distort competition within the European market. With the merger control regime, the Commission has the power and authority to review, investigate and approve, block or impose certain demands/ remedies on proposed mergers or acquisitions that qualify certain turnover thresholds.[31] Accordingly, the EU merger control regime has been instrumental in several landmark cases involving American tech giants, including Google (Alphabet Inc), Apple, Facebook (Meta Inc), Amazon and Microsoft[32] companies notorious for having acquired a massive number of tech startups since the early 2000s.[33] With the corporate strategy of the killer acquisition, a study has shown that around 60% of the target company’s products or services vanished within 12 months after the acquisition by GAFAM![34]

The EU merger control regime includes several significant legal instruments aimed at preventing

[29] DW. *EU Charges Apple with Breach of Competition Law* – (DW, 2021) 1

[30] Jack Nicas, *Apple Becomes First Company to Hit $3 Trillion Market Value*. The New York Times (2022)

[31] European Commission. *Competition: ‘Merger Control Procedures Which Mergers Get Reviewed by the EU*?’. (2013)

[32] Alessandro Massolo. *Mergers in Big Tech: An Overview of EU and National Case Law*. e-Competitions Bulletin (2022)

[33] Luis Cabral. *Merger Policy in Digital Industries.* Information Economics and Policy 2020.

[34] Axel Gautier and Joe Lamesch. *Mergers in the Digital Economy* CESifo Working Paper No. 8056, (2020).p. 3.

anti-competitive mergers and acquisitions, where dominant corporations acquire potential rivals to distort or eliminate competition. Some important legal instruments that address this issue include the EU Merger Regulation Council Regulation No 139/2004, which establishes the rules, framework and procedures for reviewing and evaluating those mergers and acquisitions that meet certain commercial conditions. According to EU Merger Regulation, which applies to certain mergers and acquisitions that have an EU dimension, where the parties in concern if their combined turnover exceeds certain thresholds, the commission has the power and authority to intervene, examine, investigate and if determined, to prevent anti-competitive behaviour. As per Article 2(3) of the regulation, (under the provisions of appraisal of concentrations) allows the European Commission to proscribe a merger or acquisition if it deems it 'significantly impedes' effective competition within the EU market.[35]

The European Union's horizontal merger guidelines provide guidance for the assessment of horizontal M&A (mergers and acquisitions),[36] which potentially involves corporations that operate in the same product and/ or geographic markets. The guidelines outline the factors that the Commission essentially considers when assessing and evaluating the competitive effects of such M&A, including the potential for the elimination of actual or potential competitors. Moreover, in 2021, the European Commission published the Vertical Merger Guidelines[37] for the purpose of assessment of vertical mergers. These guidelines essentially provide a comprehensive framework for analysing potential anti-competitive effects or impacts of vertical mergers and acquisitions, that potentially takes place including killer acquisitions. This outlines the forms of concerns that may occur in vertical mergers, such as foreclosure of competitors etc. This aspect will be further discussed in detail later in chapters 3 and 4, in the context of large technology corporations and their business practices that have an impact on EU competition policy.

Furthermore, a recent development concerning specifically the digital landscape, the Digital Markets Act which the EU introduced, aimed at further regulating the digital platforms targeting primarily the dominant big tech companies with significant market share[38] and power in this sphere.

[35] Carlo Monegato. *The Modernisation of EU Merger Control*. Lexxion Legal Publisher (2022)

[36] Guidelines on assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03)

[37] COMMUNICATION FROM THE COMMISSION - *Guidelines on vertical restraints* (2022/C 248/01)

[38] Jullien and Wilfried Sand-Zantman. *The Economics of Platforms: A Theory Guide for Competition Policy* (2019). TSE Digital Center Policy Papers. No.1, 2019, p.4-8

It also includes certain provisions to prevent killer acquisitions by requiring notification of all acquisitions by large digital platforms, regardless of turnover thresholds.[39] It also includes provisions to address other anti-competitive practices by digital platforms, such as self-preferencing.

2.3 Digital Sector and the Impact on EU's competition policy

In general, the concept of consumer harm relates to various negative impacts, including those related to price, output, consumer choice, quality, and innovation. The fundamental principle of the consumer welfare standard, as argued by *Crémer, Montjoye & Schweitzer* (2019) argues, around the defence of competition that is warranted when it prevents real harm to real people,[40] although in practical terms, the analysis of effects often focuses on identifiable consumer harm, particularly with regard to short-term and price-based effects. Nonetheless in the digital sphere, the significance of the impact on quality and, predominantly on innovation becomes more evident. This is especially apparent in platform-to-consumer ("P2C") markets,[41] where tools and services are provided to consumers at no cost, eliminating price effects as a result.

At the same time, there is a growing need to reassess the standard of proof in the digital realm, where the future is more uncertain and less comprehensible, Accordingly, under-enforcement in the digital sphere raises significant concerns, particularly considering the harm theory is likely to be long-term that opposed to the traditional markets i.e. the Pharmaceutical industry, due to the persistence of market power that it possesses.[42] Therefore, as *Crémer, Montjoye & Schweitzer* (2019) argues, even if the precise consumer harm cannot be measured, certain strategies employed by big tech firms holding dominant platforms targeted at diminishing the competitive pressure they face should be prohibited unless accompanied by well-documented consumer welfare gains.[43]

According to the case law of the European Court of Justice,[44] the assessment of how competitive pressure is eased should be evaluated with the same level of attention as the evaluation of consumer

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[39] Michael Katz, *Big-Tech Mergers: Innovation, Competition for the Market, & Acquisition of Emerging Competitors* (2020), p. 2-5

[40] Jacques Crémer, Yves-Alexandre Montjoye and Heike Schweitzer. *Competition policy for the Digital Era*. European Commission (2019) p.41-42

[41] Ibid p.41

[42] Ibid p.41

[43] Ibid p.42

[44] Case C-23/14, Post Danmark II, EU:C:2015:651, para. 65

harm in standard practice. At the same time, the anti-competitive effect of a relevant practice should not be purely hypothetical, however, it is adequate to demonstrate that such a practice possibly excludes competitors or "tends to restrict or distort competition. Accordingly, the evaluation of "potentiality" or "tendency" should be assessed with the same level of rigour and thoroughness as the calculation of consumer welfare loss in traditional competition policy enforcement.[45]

At a time authorities grappling with these evolving challenges comes the landmark development and a breakthrough piece of EU legislation, the Digital Markets Act. This places the European Union at the forefront not only in terms of keeping the big tech firms accountable in many respect for checks and balances but also aiding in the fight against killer acquisitions and breach of competition policy. This new piece of EU regulation is expected to play a key role in regulating the business practices of big tech firms from around the world. After years of consultations and deliberations, the European Parliament and the European Council have backed the Commission's proposal on reforms in the digital landscape and have approved this regulatory instrument in 2022 for a broad envisioned purpose.

The significance of this new law, which targets specifically the big technology firms i.e. the tech giants in the industry (GAFAM)[46], as the EU rules on e-commerce have not been critically reviewed for nearly 2 decades and in that time, and there have been enormous developments in the cyberspace powered by the internet of things dramatically. This development, enables the Commission, as the executive arm of the European Union, to take a more proactive role and provide if required, remedial measures dealing with any situation suspected of market dominant players abusing their position or violating competition rules i.e. when they take control of smaller innovations (startups) business in this fast-evolving digital sphere.

Under the EU Merger Control Regime, a merger or acquisition falls within the scope of the EU Merger Regulation No 139/2004. Both the EU Merger Regulation and the DMA are effective legal instruments that control and prevent mergers and acquisitions that breach EU competition policy, which applies to all mergers and acquisitions that qualifies certain commercial turnover thresholds. Currently, under Article 1(2) of the EUMR, a potential merger or acquisition comes under the

[45] Case C-549/10 P, Tomra and Others v Commission, EU:C:2012:221, para. 68

[46] See, the tech giants predominantly include i.e. Google, Amazon, Apple, Meta and Microsoft that's been targeted by EU merger control regime

jurisdiction of the European Commission, should:[47]

(a) the combined collective worldwide turnover of all the undertakings in concerned exceeds €5 billion; and
(b) the collective EU-wide turnover of each of the undertakings, at least two of the undertakings concerned exceeds €250 million.

Moreover, under Article 1(3) of the EUMR, which can apply should the combined worldwide turnover of all the undertakings concerned in this regard exceeds €2.5 billion, and the collective EU-wide turnover of each of at least two of the undertakings concerned exceeds €100 million, if at least two of the undertakings concerned continue to conduct commercial activities within the same Member State or where a joint venture is to be established which will be active in that Member State.[48] Article 3 of the EU Merger Regulation No 139/2004, provides for a review process where the Commission can independently assess and evaluate the competitive effects of a merger or acquisition and accordingly demand remedial action if deemed suitable.[49] Moreover, under Article 8 of the regulation, the Commission also has the power and the authority to proscribe mergers or potential acquisitions that may potentially and significantly impede effective competition within the EU market.[50]

On the other hand, the DMA applies to 'gatekeeper' platforms, which as per Article 3(1) of the DMA defines platforms as those with a "*significant impact on the internal market*" and that "*serves as an important gateway for business users to reach end users*", and "*enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future".* Article 3(1) of the DMA defines the criteria for being a gatekeeper, which includes turnover and market power thresholds.[51] The DMA has the power and authority under Article 5 to proscribe certain "unfair practices by gatekeeper platforms" such as self-preferencing, and under Article 6 for dealing with business conduct such as tying or bundling which can hinder or impede EU competition policy. Additionally, this legislation also includes certain provisions with regard to the acquisition of potential competitors by gatekeeper platforms. Article 7 obliges gatekeepers with the burden of notifying the European Commission of any proposed mergers or acquisitions,

[47] Council Regulation (EC) No 139/2004 of 20 January 2004, article 1 (2)
[48] Council Regulation (EC) No 139/2004 of 20 January 2004, article 1 (3)
[49] Council Regulation (EC) No 139/2004 of 20 January 2004, article 3
[50] Council Regulation (EC) No 139/2004 of 20 January 2004, article 8
[51] Digital Markets Act (DMA), 2022

regardless of turnover thresholds. Besides a proactive move by the Commission, to establish a system under article 24 of DMA, where the Digital Markets Advisory Committee assist the Commission in the implementation and enforcement of this regulation.

2.4 Significant development & jurisdiction factor

Facing the current and future challenges faced by the European market in the digital sphere, one of the significant highlights is that the European Union takes a pragmatic and logical approach with the Digital Markets Act. This provides the European Commission with extraterritorial reach, and unprecedented jurisdictional powers and authority to implement its landmark legislative objectives primarily targeting the big tech firms. This landmark piece of legislation applies to service providers of digital platforms that serve as a central gateway for business users to reach end users, regardless of whether the provider is established in the EU or not. Article 1 (2) of the DMA, defines its scope of application of the regulations, which identifies the platform service providers or ‘gatekeepers’ - regardless of their place of establishment or residence.

Redefining and broadening the obligations for gatekeepers, under Article 12 of the Digital Markets Act, which imposes upon gatekeepers who are subject to a set of obligations, who possess significant influence in the relevant markets. Thus, such obligations are aimed at promoting competition, innovation and consumer welfare. Furthermore, Article 37, emphasises the joint responsibility and cooperation between the Commission and the member states and the need for ‘close cooperation’ and need for enforcement action with national authorities, which highlights the seriousness of the European Union in the process of regulating and full and effective implementation of this legislative instruments in the wake of growing challenges posed by the big tech firm, whilst shielding the EU based startup companies in the interest of promoting innovation and upholding EU competition policy.[52]

[52] OECD, *Annual Report on Competition Policy Developments in the European Union*. (2021).

2.5 Summary

The DMA supplemented by the EU merger control regime primarily aimed at upholding EU competition policy and preventing and counteracting any or potential anti-competitive practices by large digital platforms. While preventing killer acquisitions and protecting EU startups from tech giants, is one of the significant objectives of the DMA, It is also aimed at ensuring a level playing field for all business ventures (big or small) operating in the digital market and promoting fair competition and innovation whilst aim to protect and defend EU startups against hostile actions by the large tech companies that could potentially hinder or distort EU competition policy. This includes addressing issues such as self-preferencing, gatekeeping, and unfair data practices. Overall, these legal instruments including the merger control regime aim to address and confront the challenges posed by the digital economy to competition and innovation in the EU.

3. Killer acquisitions in the digital sector

Introduction

This chapter provides an overview of the concept of killer acquisitions whilst providing an outlook on the emergence of big corporations in the context of US antitrust laws. This will be critically reviewed in the context of anti-competitive business practices of the tech giants and their impact on European startups, and more importantly on how the European Commission deals with this emerging development.

3.1 The Rise of Large American Corporations & US Antitrust Laws

In the late 19th and early 20th centuries, the United States economy experienced sizable changes, marked by swift industrialization and the emergence of large corporations. This period is well known as the 'Gilded Age' and was characterized by the development of monopolies and the concentration of wealth, power and authority in the hands of a few influential persons. During this period, the US Antitrust laws were passed by the congress to promote competition and prevent the potential formation of monopolies or cartels.[53] Accordingly, the US has a long history of antitrust laws designed at promoting and fostering competition whilst preventing the formation of monopolies. The most famous of these is the Sherman Antitrust Act of 1890 which bars certain commercial activities considered to be anti-competitive.[54] This legislation was subsequently supplemented by the Clayton Antitrust Act of 1914,[55] which enlarged the Sherman Act by banning certain anti-competitive practices, for example, exclusive dealing price-point discrimination or tying arrangements. One of the key weaknesses in US antitrust laws that can be argued is the fact that its main focus is on consumer welfare. The laws provide emphasis and prioritize the impact on consumers over the impact on competition. This essentially means those anti-competitive conduct that does not necessarily harm consumers may be endorsed. This has led to certain situations where large companies like Amazon have been accused of predatory pricing from an anti-competitive standpoint, but they have not been confronted with the full force of the law simply because their actions are seen to be benefiting the end consumers.[56]

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[53] Richard A Posner, *Antitrust Law* Second Edition, University of Chicago Press (2001)
[54] Sherman Antitrust Act (1890).
[55] Clayton Antitrust Act. (1914)
[56] Richard A Posner, *Antitrust Law* Second Edition, University of Chicago Press (2001)

3.2 Emergence of tech giants & concept of '*killer acquisitions*'

In the recent decade, the digital economy has witnessed massive growth and consequently the emergence of big tech firms that have become dominant players in the digital markets. These companies, which include Amazon, Apple, Facebook, Google, and Microsoft, have created huge value and have disrupted traditional industries. Nonetheless, their market dominance has raised concerns about their anti-competitive conduct that has impacted innovation and competition in the EU, especially in light of the increasing trend of killer acquisitions.

The well-known term 'killer acquisitions' denotes mergers and acquisitions of smaller start-ups by larger technology companies in a bit to neutralise or eliminate perceived competitors or potential competition from the digital market they operate.[57] A term initially coined by the legal scholar Colleen Cunningham and Florian Ederer in their popular journal "*Killer Acquisitions*" published in 2018.[58] Such acquisitions can be instrumental as a tool to minimise or eliminate competition whilst securing and sustaining their dominant position in the market by such predatory dominant firms. In recent years however, there have been mounting concerns around the impact of such killer acquisitions by the big tech giants, such as Google, Amazon, Apple, Facebook, and Microsoft[59] on the competitive landscape of the digital market. Such rapacious business conduct is accused of taking place before a potential competitor becomes a significant threat to their market dominance. Such acquisitions have been prevalent in the digital sector in the recent past, where start-ups including those in the European Union, particularly those with innovative ideas, technologically advanced products or services, are often targeted by these big technology firms. In this regard, the European Union has been at the forefront of countering and addressing these concerns through its merger control regime.[60]

One of the landmark cases in 2014, when Facebook (now called Meta Platforms Inc.) acquired WhatsApp, which was a rapidly growing instant messaging service with around approximately 600+ million users worldwide, for a colossal $19 billion at the time, which was regarded as one of the biggest tech acquisitions in history. The US Federal Trade Commission (FTC) launched an investigation into the acquisition in March 2014 to determine whether it violated US antitrust laws.

57 Chris Pike. *Start-Ups, Killer Acquisitions and Merger Control.* OECD Journal. (2020)
58 Colleen Cunningham, Florian Ederer and Song Ma. *'Killer Acquisitions'* Vol. 129, Journal of Political Economy. (2018)
59 Raphael Reims. '*Can Competition Law Rein in Big Tech?'* LSE Business Review (2022)
60 Kyriakos Fountoukakos. *European Union: The Latest on Merger Controls.* Global Competition Review, (2022)

The acquisition in concern, which was subject to regulatory approval, in the same year, the European Commission also initiated an investigation into the merger in April 2014 under the EU Merger Regulation. The case raised some noteworthy concerns about the potentially anti-competitive nature of the transaction and the effects of the planned acquisition on the specific digital messaging market. Critically reviewing the EU merger control framework to be able to evaluate the case in hand, in light of possible killer acquisition allegations, it is worthwhile looking at not just the facts of the case but also the compelling arguments put forward by the Commission at that stage, to be able to fully appreciate the judicial decision that followed in this landmark case.[61]

3.3 Collateral Impact on Innovation and Competition in the digital market

Killer acquisitions potentially have substantial collateral impacts on innovation and competition. For example, when start-ups are acquired by larger tech firms, their innovative technologies may be shelved or incorporated into existing products owned by such big tech firms. Thus, limiting the potential for competition and innovation to thrive in the market. This could have a severe impact on consumers who may be left with fewer choices and alternatives, including other consequences such as driving higher prices, whilst reducing the quality of products and services offered in the market.[62] Moreover, the acquisition of European start-ups by these large tech firms can potentially deter entrepreneurship and innovation in the EU marketplace. Consequently, entrepreneurs or innovators may be discouraged from starting businesses in industries dominated by large firms that have a strong presence and a track record of acquiring potential competitors. This can potentially limit the pool of innovative technologies available within the EU whilst potentially impeding and severely reducing the competition in the market, and as a result, ultimately harming for the detriment of the consumers.

[61] Facebook/WhatsApp (Case M.7217) EC 2017/1281
[62] Chris Pike. *Start-Ups, Killer Acquisitions and Merger Control.* OECD Journal. (2020)

3.4 Concerns of anti-competitive practices in the digital sphere

As per FTC’s complaint that Facebook's merger with WhatsApp was anti-competitive in nature and the social media giant had a history of using its market dominance in social media to neutralise or eliminate competitors from the market. Moreover, the complaint also highlights the grave concerns over the potential impact of the merger on data privacy, and data security, whilst impeding consumer choice. As per the US Federal agency FTC's complaint against Facebook's acquisition of WhatsApp, the apparent violations were based on the following legal provisions. Section 7 of the Clayton Act, which prohibits any mergers, acquisitions, or certain types of joint ventures, where the impact may be so serious that could substantially lessen the competition in the market[63], and Section 5 of the Federal Trade Commission Act, which concerns with unfair or deceptive acts or practice that impacts competition and create a monopoly in the relevant market.[64]

From the European Union’s standpoint, critically analysing the case, amongst different concerns, one of the core concerns raised by the European Commission was the point around the prospective anti-competitive (horizontal) affect the merger could have on the market for consumer messaging apps. The European Commission was particularly concerned that the social media giant Meta Platforms (Facebook, as it was then called) acquisition of WhatsApp will diminish or eliminate competition between two major operators in the messaging app market, and thereby minimise the consumer choice and innovation in this market. Moreover, the EC was also flagging that Facebook will be in a position to access valuable user data from the acquiring WhatsApp, which could be utilised to further establish its market dominance.

Besides other concerns such as data and privacy concerns with the cross-platform integration, the primary concern of the Commission was that, whilst WhatsApp is seen as a rising competitor for Facebook, this Facebook-WhatsApp merger could potentially facilitate Facebook to influence and leverage its market dominant position in the social media market that may provide a huge break to gain an unfair advantage in the mobile messaging market. The Council Regulation (EC) No 139/2004, widely known as the EU Merger Regulation, the foremost legal instrument for merger control in the EU, widely applies to concentrations that have a 'Community dimension', and as

[63] Clayton Act. Section 7
[64] Federal Trade Commission Act. Section 5

mentioned above, defined by specific turnover thresholds.[65] The EUMR primarily aims to deter and prevent concentrations that could significantly impede effective competition in the EU internal market or a substantial part of it.[66] In addition to the above EUMR, the recently introduced Digital Markets Act represents a new European legislative breakthrough, primarily aimed at addressing the decade-old legal gaps in the fast-evolving and competitive challenges in digital markets. The DMA identifies and targets large online platforms as 'gatekeepers', who must abide by certain specific rules and obligations to ensure ‘fair and open digital markets’. Although the DMA doesn't directly address killer acquisitions, it certainly complements the EU Merger Regulation by essentially providing a broader and rigorous regulatory framework to control the conduct of dominant platforms in the industry, thereby fostering and encouraging greater competition and innovation within the EU trading block.[67]

Another landmark case involving American tech giants was the merger of DoubleClick by Google in 2008 for $3.1 billion.[68] The startup DoubleClick has developed and provided online ad-serving services, which is a critical technology component for delivering and managing online advertisements. The legal significance is that the merger was due to the potential combination of Google's dominance in the online search advertising market with DoubleClick's leading position in the online display advertising market, which rather supplements not directly rivels to be regarded as competitors. The reasoning of the Commission critically assessed whether Google could become dominant in the online intermediation in the advertising space at the same time. If so, whether competition in the online ads space and intermediation services, particularly the ad serving technology could significantly impede the market competition in the EU. The Commission however determined that the merged entity will not have the ability or the incentive to shut out competition, given the fact that the presence of reliable ad-serving alternatives to DoubleClick.[69]

The Commission eventually approved the merger without any conditions, nonetheless, the decision was controversial, where critics have argued that it essentially allowed the tech giant Google to continue to strengthen its dominant position in the digital advertising market. This case however highlights the complexities of assessing mergers in fast-evolving digital markets.

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[65] Council Regulation (EC) No 139/2004 - EU Merger Regulation (EUMR)
[66] Ibid
[67] Digital Markets Act (DMA)
[68] Google/ DoubleClick. Case COMP/M.4731 – EC.
[69] Ibid

Unlike in the case of Facebook, although the European Commission subsequent to its investigation concerning the acquisition of WhatsApp, in latter 2014, eventually approved the deal, determining the transaction will not significantly impede competition in the European trading block. The Commission however in May 2017, under Article 14(1) of the EU Merger Regulation, fined Facebook to the tune of €110 million for the purpose of providing misleading and deceiving information during their investigation,[70] reflecting and more importantly giving a strong message to the big tech firms on the importance of accurate disclosure during merger investigations.[71]

One of the loopholes in the US legislation (antitrust laws) is the difficulty with the technology companies and their products in defining relevant markets in the digital sector. The digital sphere is characterized by hasty innovation and disruptions, which also means that it is rather challenging to clearly define markets and therefore market power. This has led to situations where companies like Google and Apple have been accused of anti-competitive conduct, such as favouring their own products in search results, however, have faced no legal challenges because it is rather unclear under US antitrust laws, whether they have a dominant position in that relevant market.[72]

Another apparent weakness of the US Antitrust laws is that it focuses on primarily price-based competition, which is not necessarily always applicable in the digital market. In this day and age, where the digital market dominates, businesses can offer services to consumers absolutely free-of-charge (for example Facebook)[73] or at ridiculously low prices (such as the strategy of Amazon), making it rather challenging to base the traditional Antitrust analysis to be able to identify as anti-competitive commercial conduct. This primarily has made it rather challenging for the authorities to address the grave concerns raised by the emergence of the big tech giants.[74] However, in the recent past, those legislation have proven to be much less effective in regulating the emergence of large corporations in the digital sector, such as Google, Facebook, and Amazon.

[70] EU Merger Regulation (EUMR) EC No 139/2004.
[71] Ben Moshinsky. *Facebook Was Fined €110 Million for Misleading EU Regulators over Its WhatsApp Deal*. Insider (2017)
[72] OECD. *Handbook on Competition policy in the digital age*. OECD (2020)
[73] Federal Trade Commission, *Facebook, Inc., FTC V*. (FTC 2020)
[74] Annie Palmer and Jordan Novet, '*Amazon Bullies Partners and Vendors, Says Antitrust Subcommittee'* CNBC (2020)

3.5 Strategies Employed by big tech firms

Big tech corporations have employed various strategies to circumvent competition policy rules and carry out killer acquisitions. These include merging or acquiring start-ups that are either not yet reached the turnover thresholds for merger control scrutiny or are not necessarily competitors currently just yet, but however nascent competitors those who have the great potential to become competitors in the future. Another potential strategy employed by big tech firms is to merge or acquire start-ups that possess not necessarily competitive but complementary technologies.[75] This is by doing so, big tech corporations could integrate the technology into their existing product lines and platforms, that ultimately reduces and limit the potential for competition and innovation in the respective market. Alternately, as *Scott Morton & Dinielli* argues they may also structure agreements as minority stake purchases or joint ventures (JVs), which can easily evade regulatory scrutiny. Furthermore, tech giants may also attempt to provide misleading or incomplete information during merger investigations, thereby attempting to obscure the true nature of the competitive impact of the acquisition (*Scott Morton & Dinielli, 2020*). Therefore, by calculated approach and careful consideration, acquiring such start-ups, big tech firms manage to neutralize the potential competitive threat even before it emerges.

3.6 Summary

The EU's merger control framework has been effective in preventing killer acquisitions by big tech firms in the digital market. According to a report by the European Commission, between 2014 and 2018, the Commission reviewed 315 merger cases, out of which 39 were in the digital sector. The Commission blocked three of these mergers, and another three were abandoned by the companies involved due to the Commission's concerns. The EU's merger control framework has been particularly effective in preventing killer acquisitions by big tech firms in the digital market.

[75] Fiona Scott Mortan and David C Dinielli. *Roadmap for a Monopolization Case against Google Regarding the Search Market*. Omidyar Network (2020)

One of the significant merger and killer acquisitions cases involving Meta Inc (parent company of Facebook) concerning the Facebook/WhatsApp merger in 2014. The European Commission after investigating the so-called ‘merger deal’ at that time although it eventually it approved the killer acquisition. However, in 2017, a significant step by the Commission where a substantial fine to the tune of €110 million at that time for providing misleading information during that merger review process. This can be regarded as a significant step in the right direction providing a strong message to the industry not just about the importance of credibility but more critically that the EU Commission is serious about its mission of preventing such killer acquisitions. Accordingly, the European Commission as the executive arm of the EU, has demonstrated a proactive approach in evaluating mergers and acquisitions involving large tech companies, particularly those with a dominant market position. The Commission has imposed conditions and remedies to address concerns related to market concentration and the potential for anti-competitive behaviour.

4. Merger control in an evolving digital sector

Introduction

EU merger control plays a crucial role in protecting and defending the competition policy within the EU single market. Nonetheless, EU states and authorities are grappling with the current regulatory challenges to be able to strike the right balance between revenue or turnover thresholds and transaction value thresholds, as well as in determining the appropriate requirements for acquisition and merger notifications. This chapter examines these specific legal and administrative challenges and explores potential alternative avenues from different jurisdictions, drawing on relevant EU cases, as it's an evolving subject matter within the developing discourses.

4.1 Discourse around notification requirement and merger thresholds

One of the core challenges in the EUMR, deciding the suitable thresholds to assess the impact of mergers and so-called killer acquisitions on EU competition policy. The present merger control regime employs revenue or turnover-based thresholds under Article 1(2) of the EU Merger Regulation to detect and prevent mergers with a certain amount of market presence. Nevertheless, such thresholds have been subject to severe criticism for their potential shortcomings.

Furthermore, the challenge remains with the cross-border nature of digital platforms operated by the big tech firms, and due to the evolving nature of tech companies that in the centre of attention,[76] for which as the European Commission reports suggest, where the traditional competition frameworks isn't entirely suitable for such a global digital economy.[77] However, in the recent past, with regard to several high-profile (big tech) merger transactions that effectively have slipped through the authorities at numerous merger review processes over the years.[78] Accordingly, the EU merger control regime faces several evolving challenges that include the determination of revenue

[76] Jacques Crémer, Yves-Alexandre Montjoye and Heike Schweitzer. *Competition policy for the Digital Era*. European Commission (2019), p.19
[77] Jason Furman. *Unlocking Digital Competition. Report of the Digital Competition Expert Panel*. HM Treasury Publications, London, (2019) p. 126

[78] Luis Cabral, Justus Haucap, Geoffrey Parker, Georgios Petropoulos, Tommaso Valletti, Marshall Van Alstyne. *The EU Digital Markets Act: A Report from a Panel of Economic Expert*. (2021) p. 24-25

or turnover-based thresholds and the requirements for acquisition or merger notifications. EU member states i.e., Austria and Germany have taken particular initiatives[79] to rigorously vet out and mitigate with an ambitious motivation to bring such anti-competitive practices under national legal scrutiny.[80] However, the overall effectiveness of such initiatives in preventing killer acquisitions in the digital sphere is yet to be discovered by and large.

4.2 Dilemma faced by competition policymakers

On one hand, there's widespread concern that many of these which are regarded as 'killer acquisitions', effectively fall outside the scope of the merger control regime for numerous reasons. These include but are not limited to the size of the target entities or suspected merger transactions in terms of either existing revenues or documented turnover of those entities which are so low that traditional merger thresholds are not satisfied. Accordingly, critics argue that it is a non-productive approach and an unhealthy public policy to systematically permit mergers and such killer acquisitions that are capable of creating grave anti-competitive impacts on digital markets without effective or credible scrutiny. To effectively warrant serious consideration in creating new and credible legal thresholds that will permit a more extensive review of such killer acquisitions in the digital sphere.[81]

On the other hand, there has been a significant level of discourse around, where merger thresholds have been triggered, at present standards of scrutiny for such mergers are not adequate or appropriate for changes in market structure in the digital sphere. Given the fact that the disproportionate nature of market development even within the EU, is driven by technological innovation and breakthroughs that fundamentally alter the business models. Accordingly, critics have disputed that existing legal standards of scrutiny should essentially be thinned or altered to enable the job of the national merger review agencies, either to be able to cover either all mergers or more specifically digital sector mergers. The central notion reinforcing such radical changes to the substantive assessment for review is that merger regulators should be more concerned about permitting potentially anti-competitive mergers to escape a prohibiting sanction than about engaging in excessive state intervention.[82]

[79] Peter Alexiadis, & Zuzanna Bobowiec, *EU Merger Review of 'Killer Acquisitions' in Digital Markets Threshold Issues Governing Jurisdictional and Substantive Standards of Review*. (Indian Journal of Law 2020). p.74
[80] Ibid p.75
[81] Ibid p.66
[82] Ibid p.67

Unlike in the pharmaceutical industry, as argued by *Cunningham and Ederer* (2018), where the key findings of the Cunningham study make good sense for an industry that is an absolute patent monopoly for a fixed term, where market dominance is rather evident[83] and the stages of key development of product pipeline are well understood and well-structured.[84] Nonetheless, these conditions are doubtful to arise in the case of digital sector mergers concerning European nascent firms or tech startups, where the competitive edge and the significance of whose products/ services and technology might be unknown or highly speculative.[85] In such circumstances, where more tech tools and apps may flop than necessarily succeed commercially. For these reasons, it can be extremely challenging for a merger control agency to forecast or envisage with a degree of certainty on the competitive outcome of a digital sector merger in such incubating and challenging circumstances.[86]

Accordingly, as for competition concerns with regard to digital markets, it begs the question as to which jurisdictional thresholds need to be drawn for merger notifications, that is primarily to ensure an effective merger review can take place. In this regard, various reports suggest that several different and alternative approaches may be relied upon to establish when it is suitable for a merger review agency to intervene. For example, the following alternatives have been considered, (a) merger threshold assessment based on the transaction values, (instead of the conventional revenue tests) to be able to assess the relative significance of the transaction (b) mandatory notification, grounded on the market presence of the acquirer, that suggests the acquirer commands some degree to market power (c) from European Union standpoint, re-calibration of the criterion used in the referral system and (d) the establishment a post-review process (residual power review) that will allow a merger review authority to assess the implication subsequent to its consummation.[87]

[83] Baxter William. *The definition and measurement of market power in industries characterized by rapidly developing and changing technologies*. 53(3) Antitrust Law Journal 718 [1984]; Jacques Crémer, Yves-Alexandre Montjoye and Heike Schweitzer. *Competition policy for the Digital Era*. European Commission (2019) p.119

[84] Colleen Cunningham, Florian Ederer and Song Ma, *'Killer Acquisitions'* Vol. 129, Journal of Political Economy (2018)

[85] Chris Pike, *Start-Ups, Killer Acquisitions and Merger Control*. OECD Report (2020) (n 6).

[86] Peter Alexiadis, & Zuzanna Bobowiec, *EU Merger Review of 'Killer Acquisitions' in Digital Markets Threshold Issues Governing Jurisdictional and Substantive Standards of Review*. (Indian Journal of Law 2020). p.70

[87] Ibid p.72

4.3 The argument for the transactional value

The largest technology firms around the world have intensified engaging in mergers and killer acquisitions in the recent past and many experts have voiced concerns over this trend, whilst many mergers raise no concerns or raise concerns which are not specific to the digital environment.[88] However, the acquisition of tech start-ups is of concern, that still (at the time of a potential killer acquisition) may have very low turnover and may not necessarily be “captured” by the traditional merger control approach. One popular recommended approach is to facilitate merger control agencies to review and appraise digital market mergers more effectively by the adoption of transactional values as a supplementary approach and criterion alongside the conventional jurisdictional tests based on historical revenues or turnover criteria.

The argument for the introduction of transaction value thresholds remains with the above-mentioned drawbacks and perhaps weaknesses in the EU merger control regime as been pointed out by some experts,[89] which possibly can apply to the revenue or turnover thresholds as well. Transaction value thresholds, on the other hand, will consider the economic significance of a merger or acquisition rather than purely relying upon revenue or turnover figures. By incorporating transaction value thresholds, the EU merger control system will have a more targeted approach, focusing on mergers with substantial economic impact[90] while reducing the burden of unnecessary notifications.[91] This proposition aims to ensure that the trivial revenues of European tech start-ups do not necessarily hamper the merger review process if the acquirer had recognized substantial (potential) value creation ability in the target business entity. This has been factored in the Cremer Report, among other sources, elucidated extensively.[92] However, it is also observed that the implementation of a jurisdictional transaction value-based test can potentially impose additional administrative burdens on both regulatory agencies and EU businesses. Consequently, its application will require a significant allocation of resources.[93]

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88 See OECD, *Data-Driven Innovation: Big Data for Growth and Well-Being*. Paris, 2015

89 Luis Cabral, Justus Haucap, Geoffrey Parker, Georgios Petropoulos, Tommaso Valletti, Marshall Van Alstyne. *The EU Digital Markets Act.* A Report from a Panel of Economic Expert’ EC. (2021) p. 24

90 *See,* EC *‘COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT REPORT. Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL* on contestable and fair markets in the digital sector Digital Markets Act (2020) 842 final} -{SEC(2020) 437 final}’ SWD (2020) 364 final, paragraph 119

91 See Jacques Crémer, Yves-Alexandre Montjoye and Heike Schweitzer. *Competition policy for the Digital Era*. European Commission (2019), p.113-119

92 Ibid p 113

93 Ibid p 119

However, the authors, *Streel* & *Bourreau* (2019) argues that they do not consider the introduction of such a transaction value-based standard may severely increase the overall number of notifiable mergers, as such mergers or acquisitions transaction value in generally closely connected to the turnover of either merging firms. *Streel* & *Bourreau* (2019) also argue that they do not envisage that such a transaction-based standard should operate automatically either. Instead, they anticipate. that such an additional jurisdictional test should essentially be applicable purely at the discretion of the national merger review authorities, where such high transaction cost is believed to reflect the important presumption of revenue streams of the innovative target in the foreseeable future to which the premium that the acquirer is prepared to pay ensuring that they have the prospective ability to dominate or monopolise the target market in the aftermath of "killing" the innovative technology of the acquired firm. Moreover, there are already several countries and jurisdictions which has seen the importance and have harmonised the transaction value-based approach considering the important role it plays particularly in determining the merger control jurisdiction to be exercised.[94]

For example, Germany and Austria from the European Union standpoint, and India from outside the European Union, that relies on merger thresholds that are based on transactional values that is been investigated, to empower authorities to be able to examine transactions even if the asset or revenue thresholds have not been met.[95] In the European context however primarily in response to several large digital sector merger transactions involving some of the American big tech giants that have effectively slipped through under numerous merger review powers over the past decade, both in Germany[96] and in Austria, the European member states[97] have respectively introduced transaction value-based assessments in 2017 with an objective of bring particularly the 'killer acquisitions' in the digital sector within their authorities respective jurisdictional realm.

[94] Alexandre de Streel, & Marc Bourreau. *Digital Conglomerates and EU Competition Policy*. Centre de Recherche Information, Droit et Société, (2019)
[95] Note, with the introduction of a draft Competition Amendment Bill in India in March 2020, that is undergoing the stage of public consultation <https://prsindia.org/billtrack/the-competition-amendment-bill-2022> Accessed 18 April 2023
[96] German Act Against Restraints of Competition 2013 *(See, as amended by the 9th amendment)*
[97] Austrian Cartel Act 2005 as amended by the Austrian Cartel and Competition Law Amendment Act 2017

However, critiques have argued, in practice this supplementary exercise has brought very few additional mergers within the scope of the German and the Austrian mandatory merger filing obligations with the new thresholds drawing a range of transactions including those outside the digital sphere (i.e., predominantly in pharmaceuticals and from other business industries such as from the real estate sector etc).[98] Nonetheless, an initial review of the success story of the German and Austrian practice has suggested a positive note to the OECD, given the minor amount of transactions captured under the new jurisdictional assessment, corporates could barely said to have borne substantial additional costs in terms of regulatory compliance.[99]

On the positive side, observes the OECD, the added merger cases scrutiny may have been fruitful in deterring what's called any regulatory 'gaming' of the former turnover-based notification system essentially by preventing or deterring some of the suspected mergers from taking place in the first place.[100] At the same time OECD also has considered the prospects of some of the players including the big tech firms might attempt to alter their acquisition-related conduct by engaging in more speculative mergers from an earlier stage on the innovation cycle of a target EU tech startup company, especially prior to the valuation stage of reaching the arranged transactional value thresholds.[101]

4.4 Current challenges and criticism

To be able to reasonably determine whether or not a particular transaction value test is better suited to be able to address the perceived gap in the assessment of mergers and acquisitions in the digital sector, the foremost challenge however to duly determine the suitable transaction value level at which any notification threshold that will be fixed. Given the fact that what necessarily constitutes a significantly large transaction value, may substantially vary from sector to sector and industry to industry. Similarly, identifying an appropriate value level may also prove to be an uphill task as one has to go well beyond aiming of a particular industry or sector, although at the same time, one could appreciate and imagine that the major interest in devising such tedious assessment could originate from mergers and acquisition of the digital

[98] See, OECD. *Non-price Effects of Mergers - Note by Germany.* OECD Report (2018) p. 43
[99] See OECD Report, Chris Pike. *Start-Ups, Killer Acquisitions and Merger Control.* OECD Journal (2020)
[100] See, OECD. *Non-price Effects of Mergers - Note by Germany.* OECD Report (2018) p. 43
[101] Ibid p. 43-44

sector. Accordingly, there seems to be no reason why other IP-driven / high-value industries such as Pharmaceutical or Petrochemicals should be excluded from such a complementary jurisdictional test.[102] Therefore, it appears the great need for academics, policy experts and policymakers to be drawn to the adoption of a transaction value test which in principle could apply to all industrial sectors. But at the same time to determine a certain level that warrants only those transactions which possibly have the potential to be problematic in certain specific key industries such as the digital sector. In such a situation, the recommendation for one specific transactional value to capture all mergers and killer acquisitions could not only be elusive but as *Alexiadis and Bobowiec* (2020) argue, it might be regarded as a classic case for 'over-kill'.[103]

4.5 Summary

From a global perspective, authorities and nations around the world are certainly grappling with the difficulties on how precisely to safeguard and guarantee consumers' rights whilst could continue to benefit from opportunities derived from the digital markets' breakthrough on one hand, at the same time to promote and foster innovation on the other.[104] Therefore, it is important to exercise caution and not simply embrace the sweeping recommendations put forward by the Cremer Report.[105] Accordingly, it is prudent that the turnover thresholds in the present EU Merger Regulation be supplemented by a transaction value assessment that warrants a more prudent and pragmatic approach. Accordingly, to be able to make an informed decision about the feasibility and effectiveness of such an addition, it is equally prudent to better analyse and gain substantial insights into the practical implications of the adjustments already made and implemented in the case of Germany and Austria.

[102] See *EU Consolidated Jurisdiction Notice under Council Regulation* (EC) No 139/2004 on the control of concentrations between undertakings [2008] OJ C95/1, paras 65-67.

[103] Peter Alexiadis, & Zuzanna Bobowiec, *EU Merger Review of 'Killer Acquisitions' in Digital Markets Threshold Issues Governing Jurisdictional and Substantive Standards of Review*. (Indian Journal of Law 2020). p.70-75

[104] Jason Furman. *Unlocking Digital Competition. Report of the Digital Competition Expert Panel*. (2019) HM Treasury Publications, London. p. 126

[105] See Jacques Crémer, Yves-Alexandre Montjoye and Heike Schweitzer. *Competition policy for the Digital Era*. European Commission (2019)

5. Conclusion

The phenomenon of the so-called 'killer acquisitions' by large technology corporations in the fast-evolving digital era undoubtedly poses significant risks and challenges to the European Union's merger control framework. This essay, has scrutinised and examined the legal framework, including the EU merger control regime, the enforcement gaps, and competition policy objectives within the digital sphere. It also has explored extensively the EU's merger control regime, its jurisdictional factors, and the impact that it has on the EU competition policy focusing on the digital sector. Moreover, the rise of large US corporations and the emergence of tech giants have brought to light the concept of killer acquisitions, which have the potential to suppress innovation and distort competition in the digital market. As a result, these emerging developments have raised serious concerns including the anti-competitive practices employed by these large tech giants and therefore, the active need for effective regulatory interventions.

We have undoubtedly witnessed the EU's merger control regime, which plays an imperative role in addressing and preventing such killer acquisitions by scrutinizing potential mergers and acquisitions including in the digital sector. The European Commission, as the executive arm of the EU and the formal regulatory authority responsible for the enforcement of merger control, has largely demonstrated its continued commitment to confront and prevent anti-competitive conduct by such firms in the tech industry whilst ensuring a level playing field for all the players in the EU trading block. Nonetheless, it is also acknowledged the growing challenges confronted by the EU's merger control regime in the adoption of the fast-evolving digital landscape. The discourse around notification requirements, merger thresholds, and the dilemma faced by competition authorities and policymakers highlights the growing need for continued assessment and reforms in this regard.

In conclusion, the overall assessment concerning the research question is that the EU's merger control regime undoubtedly plays a decisive role in confronting and preventing killer acquisitions in the digital sphere. Nevertheless, in the face of fast-evolving business models and technological advancements around the world, it is however absolutely crucial for authorities and policymakers to continuously re-assess and adopt the regulatory landscape to be able to efficiently and effectively address the evolving challenges posed by anti-competitive conduct by the big tech corporations in the fast-paced digital sphere. By striking the right balance between regulatory interventions, and upholding competition policy objectives, and addressing the evolving requirements of the digital market, the European Union can continue to foster innovation, whilst ensuring fair competition and protecting consumer welfare in this fast-evolving digital era.

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