SCHOOL OF
ECONOMICS AND
MANAGEMENT

‘The More the Better’: Strengthening EU Strategies to Combat Killer Acquisitions’ Impact on Innovation in the Digital Market

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Master’s Thesis in European and International Trade Law

15 ECTS

HARN63

Spring 2024

Contents

Abstract

The increasing dynamism in the market has highlighted the limits of the current regulatory framework to counter potentially anti-competitive mergers. Highly innovation-intensive markets, such as the digital industry, represent a wake-up call given the rise of large tech firms. These have drawn the attention of regulators given the practice of acquiring innovative start-ups with a relevant competitive prospectus and subsequently discontinuing their projects, potentially resulting in lasting damage to competition. These transactions, referred to as killer acquisitions, often fall below the jurisdictional turnover thresholds of the Merger Regulation, effectively evading qualification for regulatory scrutiny. This factor, in addition to the uncertainty in the case evidence, highlights a gap in the merger control mechanism that has led regulators to look for multiple solutions to safeguard competition and innovation within the EU internal market. As new market dynamics come into being, competition law cannot remain static and observant. For this reason, new tools have been envisaged to prevent these companies from consolidating their dominance in the market. The concrete actions taken by regulators represent a change in approach, with the recalibration of the referral mechanism under Article 22 of the Merger Regulation through the release of new guidance. Moreover, regarding the designated gatekeeper in the digital market, the Digital Markets Act. However, the possibility of relying on more instruments, at the same time, raises concerns about the effectiveness of these in effectively promoting innovation through the assessment of mergers and the consequent risk of over-enforcement. The interplay between the envisaged EU competition policy mechanisms clearly exists, notwithstanding at an evolving stage. However, given the difficulty represented by the fast-evolving environment in which they intervene and the differing opinions on the matter, it is complicated to date to determine the consistency in the law of these and the consequent implications on innovation competition.

Keywords: Merger & Acquisitions, EU Merger Regulation, Article 22 EUMR, European Commission, Digital Markets Act, Article 14 DMA, Killer Acquisitions, Innovation

Abbreviations

AG	Advocate General
CJEU	Court of Justice of the European Union
CPS	Core Platform Services
DG COMP	Directorate-General for Competition
DMA	Digital Markets Act
EC	European Commission
EU	European Union
EUMR	European Union Merger Regulation
GAFAM	Google, Apple, Facebook, Amazon and Microsoft
GDE	Global Digital Economy
M&A	Merger & Acquisitions
NCA	National Competition Authority
OECD	Organisation for Economic Co-operation and Development
R&D	Research & Development
TFEU	Treaty on the Functioning of the European Union

1 Introduction

1.1 Background

The European Commission has the power to review merger and acquisition (M&A) operations where parties meet the turnover thresholds outlined in Regulation (EC) 129/2004 (EUMR), after which they fall under the Commission's jurisdiction.[1] However, in recent years, competition law has been most concerned about certain transactions, often in the digital industry, which fall outside the traditional jurisdictional scope identified by the thresholds and result in the implementation of concentrations without any scrutiny by the authorities.[2] Given the inability of the criterion to effectively capture all potentially harmful transactions under merger control, concerns about innovation in the digital industry have increased, leading to the European response to counter the so-called 'killer acquisitions' to protect competition in the digital market and preserve innovation.[3] Killer acquisitions are precisely the cause of recent concerns about mergers and acquisitions by regulators. Specifically, the killer acquisition's target is characterised by a turnover threshold below the established criteria, effectively evading the authorities' screening. This creates a regulatory gap in the mechanism for detecting possible harmful transactions. This strategic practice, through the acquisition of a usually innovative company, ensures that the incumbent firm benefits from the target's innovation and thus prevents future competition from emerging competitors.[4] Since the beginning of May 2023, the Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector has started to be implemented. Regulation (EU) 2022/1925, better known as the Digital Markets Act (DMA), was adopted with the aim of maintaining and promoting fair business practices within the digital market.[5] All companies that meet the qualitative and quantitative criteria and, thus, designated as 'gatekeepers' will have to comply with the obligations and prohibitions outlined in the DMA to operate in the European Union by March 2024.[6] Gatekeepers are entities identified by European Officials as a threat due to their size, complexity, access and control of data and relevant influence on the European Union's internal market.[7] It is not surprising, in fact, that according to a March 2024 study of the global top 100 companies by market capitalisation, companies

[1] Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (EC Merger Regulation) [2004] OJ L24/1, art 1 (2).

[2] Morten Broberg, *'Improving the EU Merger Regulation's Delimitation of Jurisdiction – Re-defining the Notion of Union Dimension'* [2014] Journal of European Competition Law & Practice, vol. 5, no. 5, p. 261-270 <https://doi.org/10.1093/jeclap/lpu029> accessed 15 April 2024.

[3] Peter Alexiadis and Zuzanna Bobowiec, *'EU Merger Review of 'Killer Acquisitions' in Digital Markets - Threshold Issues Governing Jurisdictional and Substantive Standards of Review'* [2020] Indian Journal of Law and Technology, vol. 16: Iss. 2, Article 4, p. 67-68 <https://repository.nls.ac.in/ijlt/vol16/iss2/4> accessed 22 April 2024.

[4] Colleen Cunningham, Florian Ederer and Song Ma, *'Killer Acquisitions'* [2018] Social Science Research Network, p. 649-702 <https://ssrn.com/abstract=3241707> accessed 18 April 2024.

[5] Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector (Digital Markets Act) OJ L 265/1.

[6] Ibid art 3.

[7] 'The Digital Markets Act: Ensuring Fair and Open Digital Markets' (European Commission) <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en>.

designated as gatekeepers are in the top ten positions, resulting in a clear supremacy of tech firms.[8] The DMA was conceived with the idea of providing ad hoc measures for large operators in digital industries since the current tools for controlling such operations may not be adequate to capture the emerging problems and concerns in the contemporary scenario.[9] The strict stance taken by the European Union through the implementation of the DMA in conjunction with existing tools, therefore, aims to block more decisively all transactions with the potential of stifling innovation, preventing gatekeepers from further consolidating their dominant position in the market. Referring specifically to Article 14 of the DMA, gatekeepers are now under a legal obligation to inform the commission of their intention to implement concentrations involving a core platform service or any other service in the digital sector.[10] Regarding mergers and acquisitions, the purpose is to provide an instrument with an ex-ante evaluation mechanism, which can operate in parallel with the traditional instruments in force in competition law under the EU merger control. In fact, the DMA is intended to complement the recalibrated approach to Article 22 of the Merger Regulation (EUMR)[11], for which any transaction considered by a member state to be suspected of adversely affecting trade between members and posing a significant threat to competition may be reported to the Commission regardless of whether it has a "Community dimension".[12] The question arises as to whether this change in approach is necessary if an instrument alone is not enough to screen out transactions that circumvent the jurisdictional threshold of the EUMR. Moreover, based on this, whether the position taken by the European Union is indeed the best deal following the tenet of 'the more the better' to protect and promote innovation at the same time when it comes to M&A transactions.

1.2 Purpose and research questions

The purpose of this study is to delineate and assess the procedures employed by the European Union for the regulation and evaluation of the execution of mergers and acquisitions operations within the internal market, considering the recalibrated approach to Article 22 EUMR and the obligation to inform the Commission of any concentration under Article 14 DMA in the digital sector. Furthermore, the thesis aims to illustrate what could be the possible consequences on innovation caused by the progressive expansion of the Commission's jurisdiction in the merger control assessment. It will explore what underlies the concerns of the authorities and their implications for innovation.

To address the individuated purposes, this research seeks to respond to the following research question: *What is the interplay between Article 22 EUMR and Article 14*

[8] PricewaterhouseCoopers LLP, 'Global Top 100 companies – by market capitalisation', April 2024, <https://www.pwc.co.uk/audit/assets/pdf/global-100/global-top-100-companies-2024.pdf>.

[9] D. Foster, 'The New Age of Antitrust' (Frontier Economics) 2018. <https://www.frontier-economics.com/uk/en/news-and-insights/articles/article-i2297-the-new-age-of-antitrust/#>

[10] EU Digital Markets Act, art 14.

[11] Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation.

[12] Chris Grech, Sylvann Aquilina Zahra and Clement Mifsud-Bonnici, 'Article 22 EUMR: European Commission Continues to Examine below Turnover Threshold Transactions' (Lexology, 12 September 2023) <https://www.lexology.com/library/detail.aspx?g=c1e7c75c-2488-4314-9c7c-82832e5a651d>.

DMA, and considering this, what are some possible consequences for innovation in the digital industry?

1.3 Delimitations

Delimitations have been predisposed for this research. Since this work is primarily a legal study of the subject matter, there will be no in-depth investigation from an economic point of view. Moreover, there is not enough time to devote attention more profoundly to more comprehensive analyses from an economic perspective. In addition, this thesis does not aim to provide an overview and comparison of the EU merger & acquisition control measures and other individual models implemented in other regimes. However, they could be mentioned if the specificity of the subject matter, especially the US antitrust policy, is relevant. The focus will be on EU competition law, specifically on the Merger Regulation and the Digital Markets Act. The analysis of which will be primarily directed at exploring specific envisaged measures and not in their entirety. The focus of the analysis will be mainly on the measures referring to Article 22 EUMR and Article 14 DMA, respectively. Particularly regarding the DMA, being a recent major measure implemented by the EU, it is complicated to analyse its impact. Moreover, given the limited availability of information on case studies. I will not address issues of national competition law as this would be an overly broad topic of research due to the word and time limit provided. However, the national competition law component will be present, depending on the role that NCAs play or might play under EU regulations. From a research development point of view, the focus will be on M&As, mainly concerning major tech firms that have been found to be dominant or gatekeepers within the digital market. In addition, the theoretical underpinnings of the possible effects of the topics discussed will be explored in terms of their impact on innovation-driven concerns and implications on innovation. However, the elusiveness of concepts such as innovation competition is an obstacle to providing a comprehensive definition of these. It is extremely difficult to estimate the effect and impact of these factors in such work, given also the innovativeness itself and the dynamic nature of the digital environment.

1.4 Method and materials

In attempting to respond to the research question, I have relied on European Legislation regulating concentrations. The focus of this work is to respond from a European perspective, although there are similar and separate ways in which concentrations are regulated in the global scenario. Considering this, the relevance of the sources used lies in the context of the European Union's law; primary laws, such as general principles of law and secondary laws, will be critically reviewed. For this research, I have applied a traditional legal dogmatic method by clarifying the content and the function of the law concerning M&A transactions with specific regard to the burdens of the DMA introduction alongside the current legal provisions by referring to relevant sources. Moreover, previous scholars and studies have also highlighted the importance of case studies in researching the potential measures to

implement merger control effectively. Furthermore, to conduct this research, I provided a literature review to gather information on the topics introduced by providing rational reasoning to analyse the impact of the law and the theories of harm that characterise such operations, especially in the digital industry and in terms of innovation-related issues. I collected information from various sources, including academic journals, research papers, books, reports and online articles. The methodology used in this research is in accordance with scholars who have previously addressed the subject matter concerned for this purpose. This method's doctrinaire approach concerns a systematic explanation of the concepts, rules and principles embodied in the legal field of the EU competition policy, which makes it possible to navigate the possible discrepancies and gaps in the illustrated scenario. Furthermore, this work provides an analysis of the measures in the light of their interpretation by academics and experts, who also have significant influence on doctrine regarding a legal interpretation of the phenomena and legislative responses. The case law approach used in this research is consistent with this finding, as it lends itself to a practical analysis of the implemented measures to effectively enforce merger control in the European Union.

1.5 Outline

This study is divided into five chapters. Chapter 2 initially presents a detailed depiction of how M&A transactions can encounter scrutiny from regulators according to the European Union Merger Regulation. Consequently, this study explores the evolving nature of the EUMR and alterations in its approach, concomitantly with the utilisation of novel or reevaluated regulatory mechanisms and tools to fulfil its principal objective of ensuring and, at times, bolstering effective competition and innovation within a perpetually changing and developing landscape. In examining the existing oversight and scrutiny practices in a contemporary context, significant consideration is given to the pursuit of innovation prevalent in the digital industry. This includes deliberating on transactions that, while not meeting the threshold criteria for eliciting concerns, exhibit subtleties that could impede innovation and competition. Furthermore, Chapter 3 delves into elucidating the rules aimed at regulating the behaviour of large platforms acting as gatekeepers within the domain of the Digital Markets Act and how these duties enable regulators to scrutinise M&A operations alongside the EUMR referral mechanism, thus effectively identifying transactions that could potentially undermine the proper functioning of the market. Moreover, as the European Union has given competition policy a considerable role in stimulating innovation, especially in the field of mergers, this research attempts to contribute to answering whether the combined action of European legislative measures is what is needed to preserve competition in innovation-driven businesses such as the digital industry. Finally, Chapter 4 aims to ascertain whether killer acquisitions' impact is detrimental to innovation or not, bearing in mind that the main purpose of merger control is to stimulate effective competition. Therefore, whether the result of the EU's tougher stance could be more of an over-enforcement, de facto, slowing innovation. Section 5 will conclude the research.

2 EU Merger Control

2.1 Introduction

Mergers and acquisitions (M&A) have multiplied and gained importance in the setting of competition law, growing market concentrations in modern market dynamics, and globalisation. Such operations can, in fact, have worldwide ramifications due to the makeup of the market. As a result, the emphasis has been on keeping M&A under control in order to provide a regulatory framework that seeks to control merging parties and, in turn, defend the public interest and the integrity of market competition.[13] However, as market dynamics evolve and the competition characterising these ecosystems develops accordingly, the regulatory framework in assessing such transactions must go conjointly; not adapting to emerging threats would be ineffective in the purpose of stimulating and maintaining effective competition in the market.

2.2 M&A's control in a fast-evolving environment

Mergers can, in the first instance, be an instrument to stimulate competitiveness and, thus, dynamic competition, resulting in considerable benefits and incentives.[14] However, this can be achieved provided that they do not pose an actual threat or harm to the competition itself, since, on the contrary, this would lead to the consolidation of dominant positions and anti-competitive practices, thereby consequent market failure. Merger law has the function of preventing mergers that are prone to have such consequences. In this regard, a specific legal instrument has been provided to enable effective control of all concentrations in the EU, which is precisely why the EU legal basis for merger control within the EU can be discerned in the Merger Regulation (EUMR). The EUMR was conceived with the purpose of safeguarding the competition from possible lasting damage in the process of reorganisation.[15] The essence of 'control' is understood explicitly in relation to the provisions contained in the regulation to "govern those concentrations which may significantly impede effective competition in the common market or in a substantial part of it".[16]

A major part of competition law prosecutes harmful transactions; however, this varies significantly in the way the harm is identified and how intensively these are scrutinised by regulators. Competition officials must, therefore, aim to predict possible future harm rather than assess past harm to apply control efficiently.[17] The

[13] EC Merger Regulation, art 21(4).

[14] Ibid recital 4.

[15] Ibid recital 5.

[16] Ibid.

[17] David J Gerber, *'Competition Law and Antitrust: a Global Introduction and Guide'* (Oxford University Press, USA 2020), p. 79-81.

result is that most legal regimes often require prior notification of the intention to merge when the possibility of incurring attention-grabbing operations is present, aiming at "taking into consideration the many constantly evolving factors which may impinge on the future development of supply and demand on those markets".[18] The notification system of a merger is one of the most important tools of the EU merger control regime, as it allows the competent authorities to effectively implement the supervision of a transaction. Under the EUMR, a mandatory notification regime is provided for concentrations having a 'Community dimension' identified in the scope of the Regulation.[19] Article 7(1) of the EUMR states a standstill obligation in this regard, properly, that a concentration "shall not be implemented either before its notification or until it has been declared compatible with the common market".[20] The requirements for notification are met when certain thresholds are reached.[21] These, as outlined, represent the scope of application of the EUMR, having the function of a 'filter' for all those transactions that reach a Community dimension based on the turnover and area of activity of the undertakings involved.[22] Essentially, this is a quantitative criterion that does not assess the market position of the parties nor the impact of the transaction. The aim, precisely, is to provide an objective mechanism for the parties involved to understand whether they fall under the notification obligation based on the 'one-stop-shop' principle in terms of the exclusive competence of the Commission, ensuring the proper functioning of the system while avoiding the risk of fragmented assessments.[23] The establishment of thresholds ensures that a balance is achieved in the merger control system between the effective assessment of competition and the avoidance of delays and additional costs that would be detrimental and unnecessary for the parties involved.[24]

However, the EUMR's quantitative criteria were found to be inadequate to efficiently capture all those transactions where the target company, while not reaching the predefined threshold for the implementation of mandatory scrutiny, represents a potential threat to competition and trade between Member States.[25] This highlights the pressing need for a more effective system. Significantly, the EUMR provides for referral mechanisms that intervene when as many conditions are met and to compensate where the threshold system in the Union cannot intervene. In the EU, there are two types of referrals regarding mergers: a pre-notification and a post-notification referral system. For the purposes of this paper, I will deal with what falls under the second type. In this sense, Article 22 EUMR represents a post-notification referral mechanism that empowers the Commission to scrutinise transactions that do not meet the predefined thresholds in question and that, in this process, Member States are not excluded from making a referral request to the Commission for 'any concentration'.[26] This underscores the crucial role of this mechanism in the EU

[18] Case C-12/03 P *Commission v Tetra Laval*, EU:C:2004:318, Opinion of AG Tizzano, para 73.
[19] EC Merger Regulation, art 1(2) (3).
[20] Ibid art 7 (1).
[21] Ibid art 1.
[22] Ibid.
[23] Commission, Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings (2008/C 95/01), para 127.
[24] Richard Whish and Davide Bailey *'Competition Law'* [2018], p. 832-833.
[25] *Facebook/WhatsApp* (Case COMP/M.7217) Commission Decision C(2014) 417/02 [2014] OJ C 417, paras 9 ff.
[26] Case T-227/21 *Illumina v Commission* [2022] OJ C451, para 107.

competition law landscape. Indeed, Article 22 EUMR, entitled 'Referral to the Commission', allows Member States to refer cases that do not meet the turnover thresholds to the Commission, sometimes at the Commission's own invitation.[27]

2.3 Article 22 of the EUMR

The General Court foresaw and confirmed a further way to provide a more effective tool to hinder all non-reportable mergers that, therefore, do not fall within the parameters defined in the scope of the EUMR.[28] These provisions are elucidated in Article 22 of the EUMR, as said, whose approach has recently been revised in 2021 through the provision of guidance by the European Commission. In fact, although there is no Community dimension, one or more Member States, following notification by a National Competition Authority (NCA), may request the Commission to examine any merger that ”affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request”.[29] The NCAs undertake an assessment of the scope of the potential effect a transaction may have on the geographic market at the national level or wider, as well as potential difficulties in gathering the necessary information. Should the Commission decide to accept the referral, the national procedures of the requesting states are terminated. The Merger Regulation, in its function to act as a ’corrective mechanism’, plays a crucial role in implementing control over “all concentrations which are capable of significantly impeding effective competition in the internal market and falling outside the scope”.[30] Based on a literal interpretation of the first subparagraph of Article 22 EUMR, what emerges is that effective cooperation between Member States and the Commission is necessary for this mechanism to work.[31] The problem of delegation of powers between the Member States and the European Institutions has always been at the heart of the negotiation process of the Merger Regulation. Since the adoption of the EUMR in 1989 and its amendment in 2004, the rules for the distribution of merger control powers have been well delineated by reference to the quantitative threshold. If it is reached, the transaction falls under the exclusive competence of the Commission and the Member States will not apply their national competition laws.[32] On the other hand, following the ’one-stop-shop’ principle, the Commission has no competence under the EUMR when the merger does not meet the thresholds, as it has no ’Union dimension’.[33] The interplay of this division of competencies is implemented through several 'compromises', one of which is Article 22 EUMR itself, as can be seen in the *Apple/Shazam* case, where the merger was reported to the Commission by a NCA.[34] Notwithstanding, at the time when the previous version of the EUMR was in force, the Commission authored a specific Green Paper that clearly emphasised that ”the possibilities appear limited for making Article 22 EUMR a useful measure of general

[27] EC Merger Regulation, art 22.
[28] Ibid art 22.
[29] Ibid art 22 (1).
[30] *Illumina* (n 26), para 177.
[31] EC Merger Regulation, art 22 (1).
[32] Ibid art 21 (2) (3).
[33] Ibid recital 8.
[34] *Apple/Shazam* (Case M.8788) Commission Decision C(2018) 5748 final [2018] OJ C 106, paras 6-9.

application to multiple notification cases" due to remaining technical differences in national regimes.[35] In fact, the initial idea behind the provisions of Article 22 EUMR was to provide an instrument to assist mergers in those Member States that do not have domestic legislation to assess them; the originally included so-called 'Dutch clause'.[36] Although, at first, it was seldom applied inasmuch all (or almost all) the Member States adopted a domestic merger control regime and so, fewer opportunities to refer a case to the Commission. Moreover, the same Commission seemed to discourage individual Member States based on the experience so far that such transactions generally did not represent a particular problem in the internal market.[37]

2.4 A novel approach to Article 22 EUMR

The new recalibrated approach to the referral mechanism under Article 22 EUMR stems precisely from the need to ensure and encourage that a Member State can refer to the Commission to review transactions where the turnover of at least one of the companies involved does not reflect the current or potential future competitive aspect.[38] And whether those national authorities have the power to review the case themselves. The Commission's recent adoption of a specific guidance highlights how this was the result of a perceived enforcement gap in this mechanism due to the problems arising from the acquisition of innovative start-ups or newcomers having an actual or potentially significant impact on competition.[39] Indeed, due to acquisition, this often ended up stifling the innovation brought by innovative companies, thus nullifying the competition itself. The Commission's decision to reinterpret the references in Article 22 EUMR represents a substantial change in approach, demonstrating a quasi-priority in the treatment of eligible cases under the requirements set out in the Article, increasing the necessary cooperation between the Commission and the NCAs to counter those cross-border transactions that could escape review.[40] The latter founding themselves with an important tool to maximise the effectiveness of merger control represented by the application of existing ex-post tools such as Articles 102 TFEU.[41] The Commission aims to encourage and accept referrals where the criteria under Article 22 EUMR are met, thus increasing transparency and legal certainty in situations that were probably characterised by under-enforcement prior to the expansion of the scope of application of the Article. The change of course undertaken, for the most part, seems to suggest a broader general approach to the implementation of merger control, as we will see in conjunction with the next chapter in a more in-depth manner regarding concentrations in the digital sector. Recently, in fact, market developments have shown a considerable increase in those transactions that have gained more attention

[35] Green Paper of 11 December 2001 on the Review of Council Regulation (EEC) No.4064/89, paras 52-53.

[36] Whish and Bailey (n 24), p. 818.

[37] Guidance on art 22 EUMR, recital 8.

[38] Ibid recital 9.

[39] Ibid.

[40] Ibid recital 10.

[41] Katalin J. Cseres, *'Re-Prioritising Referrals under Article 22 EUMR: Consequences for Third Parties and Mutual Trust between Competition Authorities'* [2023] Journal of European Competition Law & Practice vol. 14, no. 7, pp. 410-422. <https://academic.oup.com/jeclap/article/14/7/410/7301298> accessed 3 May 2024.

and consideration due to their impact on several parameters, which can potentially evade scrutiny by both the Commission and the Member States. These developments are particularly observable in sectors like the digital economy, as said, where the Commission has acted without requiring a modification of the relevant provisions concerning those within the Merger Regulation.[42] Within the guidance, the criteria for decreeing which cases may fall under Article 22 EUMR and, thus, consequently, under the European Commission's review are emphasised. As mentioned above, to implement such a referral, it is necessary that the specific case:

(i) "affect trade between Member States; and

(ii) threaten to significantly affect competition within the territory of the Member State or States making the request."[43]

In applying these two criteria, the Commission also clarifies which concentrations are eligible for referral by ensuring that they have a sufficiently relevant link to the EU itself and the referring Member States.[44] In an attempt to be as exhaustive as possible, an illustrative list of cases that may fall under the above criteria and characteristics is also provided. In fact, this includes undertaking that:

> (1) is a start-up or recent entrant with significant competitive potential that has yet to develop or implement a business model generating significant revenues (or is still in the initial phase of implementing such business model); (2) is an important innovator or is conducting potentially important research; (3) is an actual or potential important competitive force; (4) has access to competitively significant assets (such as for instance raw materials, infrastructure, data or intellectual property rights); and/or (5) provides products or services that are key inputs/components for other industries.[45]

However, the guidance's illustrative nature does not preclude the Commission from accepting referrals that are outside its scope. On the one hand, what would appear to be created is a concrete intention on the part of the regulators to permanently counteract all problematic operations by enlarging the referral mechanism's objectives and giving the possibility to be used more frequently.[46] In doing so, granting power to the Commission for the purpose of achieving the objectives of the Regulation based on the principle of subsidiarity.[47] Conversely, the risk run by following the General Court's interpretation of the first subparagraph of Article 22 EUMR is that of a chaotic over-enforcement, defined by AG Emiliou as the "competence sandwich"[48], failing a "precise allocation of competencies between national and Community control authorities", contrary to the logic of the subsidiary, as envisaged by the Court's judgement in *Portugal v Commission*.[49] This could lead to a significant waste of time and inefficient allocation of resources, ultimately resulting in legal uncertainty. The broad and unclear interpretation of the provision, reinforced by the expression 'any concentrations' in the same Article, further adds to

[42] Guidance on art 22 EUMR, recital 10-11.

[43] Ibid recital 13.

[44] Ibid recital 17.

[45] Ibid recital 19.

[46] Joined Cases C-611/22 P and C-625/22 P *Illumina, Inc v European Commission and Grail LLC v Illumina Inc* [2024] ECLI:EU:C:2024:264, Opinion of AG Emiliou, para 82.

[47] EC Merger Regulation, recital 11.

[48] Opinion of AG Emiliou (n 46), para 199.

[49] Case C-42/01 *Portugal v Commission* [2004] EU:C:2004:379, para 50.

this concern.[50] According to this interpretation, any transaction in the world would be subject to scrutiny by the Commission, regardless of its value and regardless of the presence of the parties or turnover in the EU.[51] Irrespective of a precise time frame, even after the merger is completed.[52] In AG Emiliou's view, the referral mechanism would be inconsistent with the very principles of EU merger control, undermining its efficiency and giving rise to a very significant extension of the scope. For instance, as recently occurred in Meta's proposed acquisition of Kustomer, several procedures ran in parallel.[53] Precisely, this mechanism led to a duplication of merger procedures, as a part of NCAs reported to the Commission, while another did not join said referral.[54] This represents an evident risk of divergence in the assessment, posing pressure and potentially weakening the 'one-stop-shop' principle, which would result in inefficient and uncertain procedures for merging parties.

Considering the above, a leading case for the application of the new interpretation of Article 22 EUMR is the *Illumina/Grail* case.[55] Illumina's acquisition of Grail represented the first and real example of the application of the novel approach in the merger control regime acting as a 'corrective mechanism'. The Commission, on referrals received from several NCAs, among others, France, Belgium and the Netherlands, subjected this transaction to scrutiny even though the target had no EU dimension but potentially posed a threat according to the criteria outlined above, notwithstanding the target company involved did not have business activities within the EU. According to EU Competition Commissioner Vestager's opinion, "with this transaction, Illumina would have an incentive to cut off Grail's rivals from accessing its technology, or otherwise disadvantage them".[56] Vestager's stance on the importance of preserving competition at this critical stage of development was a key factor in the *Illumina/Grail* case. Her position was perfectly aligned with the list of illustrative cases provided by the eligibility criteria under Article 22 EUMR guidance. In September 2022, after a 17-month merger investigation, the transaction was halted upon application of these provisions, as the transaction could potentially foreclose Grail's competitors by cutting their access to Illumina's technology.[57]

Although there is no shortage of criticism of the extension of the EUMR's purpose and the Commission's jurisdiction. As previously mentioned, AG Emiliou's opinion can potentially subvert the balance just established with the new recalibrated approach to Article 22 EUMR. What would result from this broad interpretation, he emphasises, would be an increase in legal uncertainty among the transaction parties and, from a more general point of view, a condition of unpredictability and inefficiency.[58] Furthermore, he argues that the effectiveness of the policy behind Merger Regulation would, inter alia, have the objective of "establishing an efficient

[50] see EC Merger Regulation, art 22 (1).

[51] Opinion of AG Emiliou (n 46), para 216.

[52] Ibid.

[53] Case M.10262 *Meta/Kustomer*, Commission Decision C(2022) 409 final - B6-37/21 *Meta/Kustomer*, Bundeskartellamt, 9 December 2021.

[54] Ibid.

[55] *Illumina* (n 26), paras 85 ff.

[56] Commission, 'Mergers: Commission prohibits acquisition of GRAIL by Illumina' (2022) IP (22)/5364.

[57] *Illumina* (n 26), para 270.

[58] Ibid para 198.

and predictable system capable of offering legal certainty to the undertakings concerned".[59] This is not fulfilled by the Commission's current policy of approaching Article 22 EUMR, as merging parties would not benefit from legal certainty in any case if they were to inform of the existence of a non-reportable transaction. The Commission might be required, at some point in the future, to review the transaction based on the broad and unpredictable interpretation of the same article.[60] On the other hand, the Court argues that this change in the approach increases the flexibility on the part of the Commission to review these transactions without being strictly dependent on the more rigid threshold system, which is considered inefficient in obstructing more and more recent concerns due to innovation-related theories of harm.[61] Moreover, the Court states that legal certainty is preserved in dealing with these cases, adding that this interpretation:

> Ensures that a concentration which, despite those significant negative effects, would not be subject to any examination, either by the national authorities or by the Commission, may be examined by the Commission. It thus concerns an action which cannot be achieved by the Member States. On the contrary, in that situation, it is essential to act at EU level.[62]

In support of the AG's argument, there would be alternative methods by which the Commission could counter potential below-threshold mergers. A more effective method, he argues, would be to rely on an ex-post review of mergers following the rules on abuse of a dominant position.[63] With specific reference to the killer acquisitions, they would represent a clear example of abuse of dominance 'by object' [64], and that, consequently, the process would be less uncertain by following the judgment of the European Court of Justice (CJEU) in the *Towercast* case.[65] The possible interaction of the available mechanisms leaves a veil of inescapable uncertainty as to how certain deal-makings suggest that the regulators are moving towards an increasingly rigorous stance. Even more so with the recently challenged General Court's (and Commission's) position regarding the interpretation first and the subsequent application of Article 22 EUMR, taking as a reference point the *Illumina/Grail* case.[66]

[59] Ibid para 193.
[60] Ibid para 207.
[61] *Illumina* (n 26), paras 143-144.
[62] Ibid para 163.
[63] Treaty on the Functioning of the European Union (TFEU) [2012] OJ C326, art 102.
[64] Opinion of AG Emiliou (n 46), para 230.
[65] Case C-449/21 *Towercast* [2023] ECLI:EU:C:2023:207, para 52.
[66] see Opinion of AG Emiliou (n 46), para 265.

3 Digital Markets Act

3.1 Introduction

Through stricter control of potentially harmful mergers, the significant role assigned to competition policy in preserving innovation and competition is, however, more an evolution than a revolution. What represents a radical change in the approach is the adoption of the Regulation (EU) 2022/1925, the Digital Markets Act (DMA), by the European Parliament and the Council on 14 September 2022. A Regulation that, considering the peculiarities and innovativeness of the digital ecosystem, became necessary to ensure an adaptation of competition law enforcement that would follow the new dynamics of an environment that, in terms of the characteristics of the present actors, differs from what the traditional regime had become accustomed to dealing with. However, as argued by J. Crèmer et al. (2019), there was, and there is no need to "rethink the fundamental goals of competition law in the light of the digital revolution".[67] Instead, it is an evolution of policy to redefine the tools at its disposal and as Guillaume Loriot (DG Comp) stated, "the Commission must also be able to deal with new untested issues that arise from new market trends" by ensuring that the rule of law relies on consistency.[68]

3.2 Why is there a need for the DMA?

The DMA is a tool further to regulate the Global Digital Economy (GDE) landscape and represents a radical change in the approach to M&A operations in the digital sector. In its efforts to promote innovation and protect competitiveness in the market, the Commission has provided harmonised rules with the aim of regulating the behaviour and conduct of the so-called 'gatekeepers', those large digital platforms that provide a core platform service (CPS) and fall under the criteria and thresholds guarantors of such designation.[69] The DMA itself was designed to fill the gaps in responding to various challenges posed by a rapidly and continuously changing environment. In the digital economy, competitive advantage is sometimes represented by new forms to which regulators must give the necessary prominence. Often, the trend in these markets is to compete with and for data.[70] The possibility given by technological evolution to collect, store and use a vast amount of data is a highly relevant and growing competitive parameter in the digitised world. It provides incumbents with a significant competitive advantage.[71] This shift is represented by using technology and innovation to create, in effect, new forms of competition. The GDE makes it more complicated to know what it means to deter restrictions on

[67] Jacques Crémer et al, '*Competition policy for the digital era*' Directorate-General for Competition (European Commission) Publications Office, 2019, p. 3 <https://data.europa.eu/doi/10.2763/407537> accessed 15 April 2024.

[68] Concurrences, Interview with Guillaume Loriot (DG COMP) - 220922 (10th Global Antitrust Hot Topics Conference, 2023).

[69] EU Digital Markets Act, art 3 (1) (2).

[70] Gerber (n 17), p. 157-159.

[71] Crèmer et al. (n 67), p. 2.

competition, which is the vital role of competition law. This leads to uncertainties in applying the 'traditional' language of competition law to the digital context.[72] Control and manipulation of data is not the only advantage they can leverage; underlying this is the extreme ease for these platforms to create network effects, which is to say to connect various business users from one business area to another.[73] The increase in value of a product or service is observed in the increase of people using the same product or service, referring to Metcalfe's Law: ”a network becomes more valuable as it reaches more users”.[74] All those characteristics have proven to be some of the primary sources of value in the digital economy, underlying the theories of harm attributed to the behaviour of large tech platforms by competition law as they are extremely difficult to oust from their dominant position in the market. This peculiarity itself represents a challenge to competition law, diverting the focus from more traditional aspects and opening the door to 'new' market dynamics and business models. It is precisely the emerging characteristics and new dynamics of these dominant companies that attribute them the position and title of gatekeeper. Moreover, they are hardly challenged by new or existing competitors in the market due to high barriers to entry or exit[75] and disadvantages, leading to an unprecedented trend of growing market concentration in the hands of only a small number of digital platforms.[76] The possible outcome of these practices, in some cases, alarms the authorities, who, however, should they invoke Articles 101 and 102 TFEU, would face exhausting investigations once a competition problem has taken place, resulting in a complex and unpredictable procedure.[77] The DMA represents the EU’s direct response to the imbalanced digital market. It aims to address the unfair practices and unfavourable conditions imposed by the gatekeepers on all platform users, thereby fostering a more equitable and competitive digital market.[78] Therefore, in accordance with the subject matter and scope of the Regulation, the real purpose of the introduction of this Regulation is to ensure the proper functioning of the internal market through fairness and creating a level playing field for players in digital markets in the EU.[79]

The Commission plays a pivotal role in this process, envisioning both quantitative and qualitative cumulative criteria to specifically designate CPS providers as gatekeepers. It concludes that only a limited number of large platforms control access to the digital market, leading to possible, yet obvious, negative effects on effective competition and contestability of the markets concerned due to the extreme dependence of many businesses on these platforms.[80] From a regulatory perspective, what is most revolutionary is that these winner-take-all large online tech firms are subject to a defined range of obligations and prohibitions.[81] This is a significant development as it aims to prevent all those practices that limit contestability or are

[72] Ibid p. 160.

[73] EU Digital Markets Act, recital 3.

[74] Bob Metcalfe, ‘*Metcalfe’s Law: A Network Becomes More Valuable as It Reaches More Users*’ InfoWorld [1995], p. 53.

[75] Deterring competitors from entering and competing or exiting from a relevant market.

[76] European Parliament, ’Digital Markets Act’, (’EU Legislation in Progress’) COM(2020) 842.

[77] EU Digital Markets Act, recital 5.

[78] Ibid recital 4.

[79] Ibid art 1.

[80] European Parliament, ’Digital Markets Act’ (n 77).

[81] EU Digital Markets Act, arts 5-7.

unfair, thereby promoting a more competitive digital market. These multi-sided platforms, often referred to by the acronym GAFAM, are the five largest tech giants: Alphabet (Google), Apple, Facebook, Amazon and Microsoft. To which the online intermediation service Booking.com was recently added following a review process conducted by the Commission.[82] Which, based on the information submitted by the platform, showed that the quantitative thresholds were met, additionally constituting an important gateway. The platform, under Article 3(10) DMA, will have to comply with the obligations under the DMA within six months.[83] However, regarding what will be addressed later in this paper, Article 14 DMA has instant effectiveness. It follows that to ensure the effectiveness of the DMA, the Commission is empowered to adopt delegated acts that supplement the current existence of DMA obligations.[84]

3.3 Article 14 of the DMA

Among the obligations for gatekeepers contained in the DMA, Article 14 proper 'obligation to inform about concentrations', provides the Commission with new powers to conduct market investigations and supervise that gatekeepers behave with respect to compliance or non-compliance with the obligations and prohibitions laid down.[85] In fact, gatekeepers must inform the Commission about any intended concentrations involving another provider of a CPS or any other services within the digital sector, such as data collection, "irrespective of whether it is notifiable to the Commission under that Regulation or to a competent national competition authority under national merger rules".[86] The direct consequence of the obligation under Article 14 DMA is that the Commission must subsequently communicate the information received to the competent authorities of the Member States and publish an annual report, in which a list of the acquisitions the gatekeepers intend to undertake will also be provided.[87] As can be seen, for instance, from the formal notification pursuant to Article 14 DMA of Microsoft's intended acquisition of Activision, according to the European Commission's list of acquisitions website.[88] Furthermore, the competent authorities of the Member States may apply to the Commission to analyse the concentration in accordance with Article 22 EUMR based on the information received.[89] Through this provision, the interplay between the measures under the DMA and the EUMR in merger and acquisition transactions is clearly visible. As specified, the reason is that the given information can be used for the application of national merger control by the NCAs or to refer those acquisitions to the Commission. The information to be disclosed by the gatekeepers is, in a sense, guided to provide at least details concerning (i) the companies involved, (ii) the annual EU and worldwide turnover, (iii) the scope of their business,

[82] Commission, 'Commission designates Booking as a gatekeeper and opens a market investigation into X' (2024) IP/24/2561.

[83] EU Digital Markets Act, art 3(10).

[84] Ibid art 12.

[85] Ibid art 14.

[86] Ibid art 14 (1).

[87] Ibid art 14 (4).

[88] European Commission, "Competition Case Search" (list of acquisitions), *Microsoft Corporation/Activision Blizzard* (2023) <https://competition-cases.ec.europa.eu/acquisitions>.

[89] EU Digital Markets Act, art 14 (5).

(iv) an estimate or transaction value of the deal and (v) a summary of the nature and rationale of the transaction, including a list of the Member States involved.[90] Keeping in mind the existing legal framework for competition regulation in the European Union, what changes the rules of the game, at least regarding the digital sphere, is the shift in the approach to concentrations to intervene before any potential harm is done regardless of proving a dominant position or meeting the thresholds for the rules to apply. A system of sector-specific regulation that regulators believe would be better suited to deal with the digital concerns that competition law 'alone' could have difficulty intercepting.[91] The preventive nature of the mechanism aims to control in advance the conduct of such companies. This is a different scenario compared to the application of merger control, where the measures, when it comes to below-threshold deals, tend to be reactive rather than preventive, often accompanied by ad hoc remedies and fines to address the potential harm derived from mergers.[92] Indeed, part of the rationale behind Article 14 DMA is to overcome this ad-hoc application of competition law reactive measures, leading to a simplification of the exhausting and cumbersome procedures of the EUMR's system and giving the Commission itself the ability to screen acquisitions "prior to its implementation"[93] through the information received.[94] The DMA itself emphasises that the Article 14 obligation is formed on the basis of "to ensure the effectiveness of the review of gatekeeper status, as well as the possibility to adjust the list of core platform services provided by a gatekeeper", explicitly specifying that the purpose of requesting ex-ante information is not merely to assist in the assessment of procedures, but to effectively serve to perform market investigations by providing relevant information to monitor contestability trends in the digital environment.[95]

3.4 The interplay between Articles 22 EUMR and 14 DMA

Properly, as any change implies, there are necessarily differences between the two mechanisms. What stands out in the first instance is that the collection of information concerning any merger transaction implemented by gatekeepers in the digital environment, as said, is mandatory. On the other hand, Article 22 EUMR provides for the possibility of referrals when the turnover thresholds do not capture a potentially harmful transaction, so it does not include a mandatory notification for any operation. In this implicitly resides a different procedure between the two mechanisms since, as with gatekeepers, there is an obligation to proactively notify the commission of any merger they intend to undertake, while under Article 22 EUMR, a Member State's competent authority may avail itself of the power to refer to the Commission a merger that may trigger the legal requirements set forth in the new guidance. As a result, the Commission will inspect all transactions involving GAFAM companies, and the complementarity with the referral of Article 22 EUMR

[90] Ibid recital 71.

[91] Pablo Ibáñez Colomo, *'The Draft Digital Markets Act: A Legal and Institutional Analysis'* [2021] 12 Journal of European Competition Law & Practice, p. 561-575 <https://doi.org/10.1093/jeclap/lpab065> accessed 7 May 2024.

[92] Commitments or restrictions to correct harm to competition or as a means to eliminate competition concerns.

[93] EU Digital Markets Act, art 14 (1).

[94] Magali Eben and David Reader, *'Taking Aim at Innovation-Crushing Mergers: A Killer Instinct Unleashed?'* [2023] Yearbook of European Law, p. 286-321 <https://doi.org/10.1093/yel/yead013> accessed 28 April 2024

[95] EU Digital Markets Act, recital 71.

ensures the capture of potentially harmful and possibly missed non-community-wide transactions.[96] In other words, the required details are an explicit reference to eventually call for a referral under Article 22 EUMR where such information meets the legal requirements to determine its application, ensuring greater transparency and enhancing the cooperation between the Commission and NCAs, as emphasised by EUMR itself.[97] On the other hand, it seems unlikely that, without the requirement to notify the Commission, undertakings involved in a merger would have the incentive to notify the Commission of their acquisitions.[98] Even if, for instance, pursuant to Article 4 (5) EUMR, the merging parties themselves in the *Facebook/WhatsApp* case submitted a reasoned submission to the Commission for an examination of the transaction.[99] In this sense, the DMA's complementarity intervenes, imposing an *aut aut* clause in an area where killer acquisitions proliferate. Hence, determining a kind of screening role for possible operations falling within the scope of Article 22 EUMR, providing all necessary information to regulators in advance, without the need to engage in time-consuming investigations and lowering the bar of incurring incorrect assessments.[100] Considering this, the provision of the obligations falling under Article 14 DMA would work in conjunction with the instruments provided by the Merger Regulation. Since all intended operations by gatekeepers will be notified to the Commission under ex-ante DMA‘s mechanism, the collection of information obtained enables Member States to make a referral under Article 22 EUMR concerning transactions pursuant to the DMA. At the same time, as a result of this combination, it is reasonable to expect an overall review of an increased number of mergers.[101] The interplay aims to raise the attention span by reinforcing control and decreasing the possibility of incurring type II errors in the case gatekeepers intend to undertake a concentration,[102] properly ensuring that enforcement decisions and judicial outcomes minimise the costs of under-deterrence of harmful conduct.[103] Recitals 10 and 11 of the DMA themselves explicitly describe the role of the DMA in relation to the provisions of competition law, specifically its relation to traditional European and national competition rules, which necessarily include the merger control rules. First, it is clearly pointed out that the application of the DMA is intended to be a functional and complementary tool to the application of competition law.[104] On the other hand, the complementarity of the DMA lies in the fact that it pursues an objective that is complementary to, but different, in order to ensure the contestability and fairness of the markets in which gatekeepers operate.[105] Thus, protecting a different legal interest ”from that of protecting undistorted competition

[96] Christophe Carugati, *‘Which Mergers Should the European Commission Review under the Digital Markets Act?’* [2023] Social Science Research Network, p. 5 <https://doi.org/10.2139/ssrn.4366703> accessed 28 April 2024

[97] EC Merger Regulation, recital 13.

[98] see art 4 (5) EC Merger Regulation.

[99] *Facebook* (n 25), paras 9-12.

[100] Eben and Reader (n 94), p. 286–321.

[101] Carugati (n 96), p. 5-6.

[102] Authorising an anti-competitive merger.

[103] Geoffrey A Manne, *‘Error Costs in Digital Markets’* [2020] Social Science Research Network, p. 34 <https://doi.org/10.2139/ssrn.3733662> accessed 8 May 2024.

[104] George Gryllos, ’The New Digital Landscape: Interaction between the DMA and Rules of national and EU law governing the conduct of gatekeepers‘ (2024) Concurrences - Revue des droits de la concurrence - Competition Law Review, pp. 40-41 <https://ssrn.com/abstract=4759968> accessed 5 May 2024.

[105] Ibid.

on any given market".[106] Rather, it establishes a set of ex-ante obligations to comply with without prejudice to the application of the EUMR, among others.[107]

Although the EU already has an effective independent merger control instrument at its disposal, on the other hand, there is, in the opinion of scholars, no lack of uncertainty as to whether the measures of Article 14 DMA are complementary to the EUMR's jurisdictional thresholds, but rather to the new approach of Article 22 EUMR.[108] However, according to a report by Robertson V. for the European Commission (2022), the proportion of digital merger prohibitions is relatively low.[109] The question that may arise is whether, indeed, such transactions need further control instruments in addition to those already in place and set out in the EUMR and, despite already possessing an ex-post control instrument on the part of the Union reaffirmed after the *Towercast*'s judgement.[110] Since, as introduced above, the advent and establishment of digital technology have brought new forms of competition for the peculiarities of the characterising environment. In this sense, the Commission has been confronted with relatively new scenarios and the need to provide for the mechanism identified in Article 14 DMA would be a solution to the difficulty of exercising jurisdiction concerning these cases, according to some.[111] In fact, the mere threshold provided by the EUMR to capture potential harmful mergers would render invisible to regulators all those transactions, especially in the digital sphere, where the target generally, although potentially very innovative and credible, does not generate noteworthy turnover. The new approach envisaged in 2021 within the EUMR, however, already by itself seems to act to resolve this gap in the interception of these cases, as the guidance itself points out and as previously seen with the *Illumina/Grail* case.[112] The position taken by the EU through the establishment of these mechanisms is clearly an expansion of the powers attributed to EU merger control. The ability to review the threat posed by mergers involving acquisitions of nascent, innovative, current/potential competitors is what underlies the complementarity of the two mechanisms. In fact, the measures envisaged under Article 14 DMA would be functional and justified by the cross-border nature that characterises the digital economy and, at the European level, would make it possible to overcome the problem that leads to fragmentation between different national rules through uniform rules governing the behaviour of gatekeepers.[113] However, considering this overlapping of numerous instruments at the same time, this can lead to the inevitable cause of legal uncertainties and administrative hurdles. Especially bearing in mind that not all transactions raise problems from a legal compliance point of view, there is a risk of over-enforcement, which could lead to an inefficient

[106] EU Digital Markets Act, recital 10-11.

[107] Ibid art 1 (6) (c).

[108] Viktoria H.S.E. Robertson, *'The Future of Digital Mergers in a Post-DMA World'* (2023) European Competition Law Review, vol. 44, no. 10, p. 447-450.

[109] Viktoria H.S.E. Robertson, *'Merger review in digital and technology markets: Insights from national case law'* (2022) European Commission final report.

[110] Case C-449/21 *Towercast* [2022] EU:C:2022:777, Opinion of AG Kokott, para 47.

[111] Meredith Broadbent, "Implications of the Digital Markets Act for Transatlantic Cooperation" (CSIS, 15 September 2022) <https://www.csis.org/analysis/implications-digital-markets-act-transatlantic-cooperation> accessed 18 April 2024.

[112] Guidance on article 22 EUMR, recital 9-11.

[113] EU Digital Markets Act, art 1 (5).

allocation of resources.[114] This is a concern that should be carefully considered. The Commission, after all, reserves the possibility to apply a considerable margin of discretion in assessing whether to reject certain cases or accept the referral.[115] Based on the complementarity of the two articles, the possible developments of AG Emiliou's opinion are also of vital importance in the near future. As already mentioned in the previous chapter, should the recent criticism against the overly expansive interpretation of Art. 22 EUMR be adopted by the CJEU, indeed by regulating against the Commission in the *Illumina/Grail* case, the interaction between the two mechanisms to catch and review below-threshold transactions would cease. This hypothetical outcome would end up having implications for the tandem functioning of both Articles, leading to even more legal uncertainty and the need for the Commission to review the instruments at its disposal.[116] Following AG Emiliou's view, the interpretation of the General Court and the Commission undermines the predictability of the merging parties, as they will never have any legal certainty as to when and if the transaction will be reviewed at some point in the future under Article 22 EUMR also after complying with the DMA requirement to inform the Commission.[117] This could lead to the result of slowing down the efficiency of merger activity, having considerable repercussions on several aspects.[118]

[114] Assimakis Komninos, *'The Digital Markets Act: How Does It Compare with Competition Law?'* [2022] Social Science Research Network <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4136146>.

[115] Guidance on article 22 EUMR, recital 22.

[116] Deirdre Carroll et al, 'Illumina/Grail: Court Opinion Could See an End to the EU Commission's Expansive Merger Review Policy', (Wilson Sonsini, 26 March 2024) <https://www.wsgr.com/en/insights/illuminagrail-court-opinion-could-see-an-end-to-the-eu-commissions-expansive-merger-review-policy.html> accessed 15 April 2024.

[117] Opinion of AG Emiliou (n 46), para 207.

[118] Ibid.

4 Killer Acquisitions and Innovation-Related Consequences

4.1 Introduction

The most recent changes in the approach to the regulation of M&A and the advent of a system-specific regulation concerning the digital environment are the responses from significant threat transactions referred to as 'killer acquisitions'. Cunningham et al. (2018) coined the term ‘killer acquisitions’ for transactions which are not mere business deals, but strategic moves designed to “discontinue the development of the targets' innovation projects and pre-empt future competition"[119], thereby eliminating any potential threat. While beneficial for the acquirer, and sometimes to some extent to the acquired, this practice can stifle innovation and limit competition in the market. From the acquirer’s perspective, acquiring and shutting down a nascent innovative rival may be more convenient.[120] Given the characteristics of targets in killer acquisitions, these are often recognised to evade the scrutiny of regulators, as they are mostly characterised by a lower turnover threshold at their initial stages of research and development (R&D) and product formulation.[121]

4.2 Killer Acquisitions – good or bad?

A study by Gautier and Lamesch (2020) showed that 60% of the acquisition cases by GAFAM analysed ended with the discontinuation of the target's innovative product.[122] This suggests that in the digital environment, the percentage of incurring in this phenomenon is still ominously high and that GAFAM firms ”are often not interested in the market performance of the firms and products, but rather in their knowledge”.[123] It arises prima facie which side to take regarding the effect that killer acquisitions may have. The very name given to such acquisitions suggests a significance worthy of being opposed to safeguarding consumer welfare and maintaining the integrity of market competition. In the absence of competition, indeed, the behaviour of firms gaining market power may have implications on welfare and resource allocation.[124] The same dreaded acquisitions themselves are, by default, subject to pose the greatest threat in terms of innovation-driven concerns. Efforts in terms of merger law reforms point to a scenario of shared concern by policymakers regarding these phenomena. The advent of the DMA intervenes with respect to a fundamental aspect, namely ensuring a priori control to preserve potential harmful conduct that precludes innovation within the market. Regulators

[119] Cunningham et al. (n 4).

[120] Chris Pike, *'Start-ups, Killer Acquisitions and Merger Control'* (2020) OECD Competition Papers <https://ssrn.com/abstract=3597964> accessed on 2 May 2024.

[121] Alexiadis et al. (n 3), p. 67-71.

[122] Axel Gautier and Joe Lamesch, *'Mergers in the Digital Economy'* (2020) CESifo Working Paper No 8056, p. 23 <https://ssrn.com/abstract=3529012> accessed 17 April 2024.

[123] Ibid.

[124] Platform practices can affect consumer welfare standards in the digital economy. Dominant platforms’ anti-competitive strategies, which aim at reducing competitive pressure, may harm consumers.

have adopted this proactive approach to foster an environment in which companies with good innovation potential can thrive. The position of GAFAM companies in terms of dominance allows them to leverage their advantages to 'kill off' innovative start-ups. This results in a significant impediment to effective competition and the slowing down of innovation.[125]

However, Cunningham et al. (2018) referred to 'killer acquisitions' with reference to the pharmaceutical sector; the doubt arises as to whether it is correct to 'expand' the same concept to other sectors with sometimes similar but completely different concerns, as in the first instance can be deduced from the strong influence of network effects that characterise the digital sector counterpointed to the pharmaceutical industry.[126] What is worrying is the effect of these operations that would result in big tech companies acquiring any potential competitor, as they can enhance the technological advantage of a dominant player, making market entry increasingly difficult.[127] This would prevent innovation from proliferating and, at the same time, act as a deterrent to the threat of monopolies or high market dominance.[128] As mentioned above, the fact that they are identified as 'killers' implies a tendency to turn out to be anti-competitive transactions, especially when this is translated into the acquisition target's ability to pursue innovation breakthroughs without resorting to a merger.[129] Margrethe Vestager defined dominant players' acquisitions as offensive and defensive strategies simultaneously, which can lead to competition concerns.[130] On the one hand, the acquirer expands its ecosystem by strengthening its dominance in more markets and, in doing so, potentially raises barriers to rivals by retaining a larger slice of customers. This concern is based on an 'ecosystem effect' resulting from an attempted acquisition away from merely substitute products and services.[131] As can be seen in the recent blocking of the digital platform Booking's acquisition of eTraveli, which otherwise would have allowed the acquirer to strengthen its dominant position in the market, raising significant barriers for competitors and passing the burden on to consumers.[132] While on the defensive, when these are aimed at protecting the buyer's core market and have the effect of stifling competition for innovation. Sometimes, this is the case where the negative impact on competition is not immediate with the transaction taking place, but it manifests itself in eliminating a prospect of future competition, effectively removing a potential competitor from the game.[133] Consequently, it strengthens the dominant position of the acquirer. In the *Adobe/Figma* case, it was possible to avert such an

[125] Crémer et al. (n 67).

[126] Cunningham et al. (n 4).

[127] Kevin Bryan and Erik Hovenkamp, *'Antitrust Limits on Startup Acquisitions'* [2019] Social Science Research Network, pp. 615-636 <https://doi.org/10.2139/ssrn.3350064> accessed 3 May 2024.

[128] Sai Krishna Kamepalli, Raghuram G Rajan and Luigi Zingales, *'Kill Zone'* [2020] Social Science Research Network <https://doi.org/10.2139/ssrn.3555915> accessed 12 May 2024.

[129] Pauline Affeldt and Reinhold Kesler, *'Big Tech Acquisitions — towards Empirical Evidence'* (2021) 12 Journal of European Competition Law & Practice 471 <https://doi.org/10.1093/jeclap/lpab025> accessed 14 Mat 2024.

[130] European Commission, "Speech by EVP Margrethe Vestager at the 22nd International Conference on Competition" SPEECH/24/1243 (Berlin, 29 February 2024).

[131] Ibid.

[132] *Booking Holdings / eTraveli Group* (Case M.10615) Commission decision of 25 September 2023 IP/23/4573.

[133] Gregory Crawford et al., *'How Tech Rolls': Potential Competition and 'Reverse' Killer Acquisitions'* (CEPR, 11 May 2020) <https://cepr.org/voxeu/blogs-and-reviews/how-tech-rolls-potential-competition-and-reverse-killer-acquisitions> accessed 13 May 2024.

effect by following a referral from Article 22 EUMR.[134] Through acquisition strategies that sometimes differ from each other and find their meeting point in being regarded as 'killers', therefore, they would be a negative factor on several fronts for innovation. Again, the lack of choice and innovation for consumers is the trade-off to be paid in the absence of effective control to counter such concentrations, which, without the Commission's most recent interventions, would easily circumvent the turnover threshold under the EUMR. However, in the opinion of scholars, it is not a priori obvious that big tech acquisitions are merely harmful.[135] They equally recognise the positive role these operations can play in fostering innovation. In fact, such transactions can have pro-competitive effects, especially if they are thought to benefit the target company itself.[136] As other scholars indicate, implementing stricter merger control may inhibit the incentive for innovation.[137] Precisely, the most far-reaching solution in prohibiting all start-up acquisitions, on the other hand, would significantly reduce the drive for innovation by making imitation prevail in the market to prevent competition from other companies.[138] Academics observe that the same start-ups' prospect to sell the activity may increase the entrant's ex-ante innovation incentive.[139] Appropriately, the role of competition policy seems to have taken a stricter stance on stimulating innovation, preserving it through efficient market competition.[140] While there is this necessity, it is legitimate to wonder whether the actions taken by the EU are the perfect net to achieve the goals mentioned above that do not undermine legal certainty, merger activity and innovation itself.[141] The effect of the stance taken by regulators implies increased equipment to deal with this phenomenon when innovation concerns arise from these concentrations. Concerns predominantly around transactions below thresholds 'call' for a reverse trend of under-enforcement. However, in this sense, the possibility of catching 'false positives' is present and, in real terms, it would translate into disadvantages for merger activity and innovation. From this risk of ineffectiveness, the question arises whether the position taken by regulators is overly redundant. Whether killer acquisitions are good or bad, in terms of innovation or not, the fact persists that by their very nature, they represent a gap in the jurisdictional rules, and, de facto, the underlying cause of many changes is precisely these transactions. As seen in the previous chapters, the instruments at the Union's disposal guarantee, on the one hand, the investigation of all transactions that call for prudence; on the other, however, it seems inevitable to incur a trade-off at the expense of consistency and coherence.[142]

[134] *Adobe/Figma* (Case M.11033) Commission decision of 14 February 2023 MEX/23/904.

[135] Chiara Fumagalli et al, *'Shelving or Developing? The Acquisition of Potential Competitors under Financial Constraints'* (July 2020) CEPR Discussion Paper No. DP15113 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3674889> accessed 10 May 2024.

[136] Ibid.

[137] Igor Letina et al, *'Killer Acquisitions and Beyond: Policy Effects on Innovation Strategies'* [2020] Social Science Research Network <https://doi.org/10.2139/ssrn.3673150> accessed 15 May 2024.

[138] Ibid.

[139] Marc Bourreau and Alexandre De Streel, *'Digital Conglomerates and EU Competition Policy'* [2019] Social Science Research Network <https://doi.org/10.2139/ssrn.3350512> accessed 17 May 2024.

[140] Eben and Reader (n 94), p. 286-321.

[141] Ibid.

[142] Ibid.

4.3 The idiosyncrasy of innovation

Recently, enforcers have turned their attention to dynamic components of competition arising from the consolidation of new concerns and threats. Innovation in several sectors, inter alia the digital industry, is a vital parameter. When reviewing a merger, the Commission indicates that in these markets effective competition can indeed be threatened by a merger between two major innovators.[143] This emphasises that a company with a relatively low market share "may nevertheless be an important competitive force if it has promising pipeline products".[144] In the *Microsoft/Yahoo* case, the Commission, in reviewing the transaction, considered the parties' incentive to innovate.[145] The ability to innovate was considered a critical parameter regarding competition between search engines, noting that "search engines not only try to develop new services but also constantly strive to innovate incrementally on existent services in order to be able to deliver better services to both advertisers and users".[146] Nevertheless, it is complicated to define innovation within the digital market. Fundamentally, each market, having its specificities, will be characterised by its own concept of innovation. As Crèmer et al (2019) note, innovation in the digital context is "frequently predominant and an integral part of competition in product and service markets".[147] For this reason, they argue, an actual definition is not strictly necessary.[148] The evolution of the competitive scenario implies a concordant evolution in the control measures undertaken by regulators. As seen in the previous chapters, the European Union has firmly signalled the position it intends to take on this issue. This stems precisely from the evolution of different concerns and theories of harm that undermine the integrity and efficiency of competition. Among these, in relation to the increasing attention paid to the digital environment, the very concept of innovation is often placed at the centre of operations with potentially damaging effects. Particularly how the conduct of certain dominant firms can influence the rivalry for innovation in the market, bearing in mind that competition law plays a crucial role in counteracting impediments to innovation competition. In this respect, the recalibrated approach of Article 22 EUMR aims to contribute significantly to this objective. In a much more significant and concrete way, if thought in conjunction with the advent of the DMA in the digital sector. In this regard, the performers' focus is turning to dynamic elements of competition.

Innovation, generally individuated by the OECD as "the successful development and application of new knowledge", can take on different intensities and different impacts depending on the relevant market sector.[149] Typically, the introduction of a new or substantially altered product or process can be identified as competition through innovation. This dynamic type of competition, in antithesis to the first impression implied by reading 'killer acquisitions', suggests a positive effect for third parties and the market itself. However, the effects that can arise from it are

[143] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03), para 38.

[144] Ibid.

[145] *Microsoft/Yahoo! Search Business* (Case M.5727) Commission Decision [2010].

[146] Ibid para 109.

[147] Crèmer et al. (n 67), p. 126-127.

[148] Ibid.

[149] OECD, 'Background Note on Competition, Patents and Innovation', DAF/COMP(2007)40 <https://www.oecd.org/daf/competition/39888509.pdf> accessed 12 May 2024.

multiple and depend on its relationship with the target market. Since innovation and competitive dynamics significantly differ across industries.[150] In AG Tizzano's opinion in *Tetra Laval*, he argues that the Commission should authorise certain transactions when market evolution is much faster than average.[151] This would make the effects of the merger extremely difficult to predict, increasing the possibility of errors and additional costs. This is remarkably accurate in the digital sector due to rapid technological progress and the complex technical and legal problems that can arise.[152] Innovative processes, seen as dynamic efficiencies, represent a key driver for competition, as much as the challenges for enforcement in this scenario.[153] The same dynamism enhances the competitive process based on future innovations and efficiencies.[154] However, it calls for a preventive intervention of competition law to ensure that anti-competitive effects are not underestimated, while pro-competitive ones are not stifled. The economist Schumpeter coined the term 'creative destruction' to describe the process of annihilation of innovations in favour of new ones.[155] The dynamism represented by this process is translated into competition 'for the market', often consisting of a continuous quest for market dominance.[156] Essentially, the competitive drive in the digital industry stems not from the availability of substitute products but from new and innovative products yet to enter the market. However, Shapiro and Varian (1999) argued that those who succeed in this dynamic environment often find themselves as temporary monopolists, compelled to sustain their position through relentless innovation.[157] Properly, according to them, the information economy is driven by the economics of networks, which, in contrast to the old dynamics in competition, holds new implications for the market and new competitive strategies.[158] For this reason, today's companies vying for dominance understand the leading technology will likely be replaced by a competitor with superior technology in a short time.[159] The scenario described depicts a fierce battle for dominance in the digital industry, where the 'killer' entity survives and holds its ground. The strategy of neutralising a potential threat through an acquisition is necessary to solidify dominance. For non-incumbents, the key is to be incentivised to innovate and 'challenge' the large firms operating in monopolistic markets. According to Arrow (1972), these firms often benefit from the status quo and lack sufficient incentives to innovate, unlike their counterparts in more competitive markets.[160] Therefore, it is essential to maintain the integrity of

[150] Mark A Lemley, *'Industry-Specific Antitrust Policy for Innovation'* [2010] Social Science Research Network <https://doi.org/10.2139/ssrn.1670197> accessed 18 May 2024

[151] Opinion of AG Tizzano (n 18), paras 76-77.

[152] Bourreau and De Streel (n 139), p. 30-31.

[153] Ariel Ezrachi, *'EU Competition Law Goals and the Digital Economy'* [2018] Social Science Research Network, p. 11-12 <https://doi.org/10.2139/ssrn.3191766> accessed 2 May 2024.

[154] Ibid.

[155] Joseph A Schumpeter, *'Capitalism, Socialism and Democracy'* (1942). University of Illinois at Urbana-Champaign's Academy for Entrepreneurial Leadership Historical Research Reference in Entrepreneurship, p. 84 <https://ssrn.com/abstract=1496200> accessed 16 May 2024.

[156] Vincenzo Denicolo et al, *'DG CoMP's Discussion Paper on Article 82: Implications of the Proposed Framework and Antitrust Rules for Dynamically Competitive Industries'* [2006] Social Science Research Network, p. 16 <https://doi.org/10.2139/ssrn.894466>

[157] Carl Shapiro and Hal Varian, '*Information Rules: A Strategic Guide to the Network Economy'* (1999) 30 the Journal of Economic Education 189, p.173 <https://doi.org/10.2307/1183273> accessed 16 May 2024.

[158] Ibid p. 173-174

[159] Ibid.

[160] KJ Arrow, *'Economic Welfare and the Allocation of Resources for Invention'* (1972), p. 619-622 <https://doi.org/10.1007/978-1-349-15486-9_13> accessed 16 May 2024.

competition to increase innovation in the market and to make sure that non-incumbents are still incentivised to innovate.[161]

4.4 The impacts on innovation competition

The importance attached to innovation-related effects is mainly due to the impact it has on the economy, not only of individual Member States, but of the European Union. Indeed, competition and innovation are closely interconnected: 'competitive markets generally promote innovation and innovation can shape and redesign the competitive scenario'.[162] In this sense, according to OECD (2023), the Commission's implementation of the protection of innovation competition regarding mergers is consistent with the regulatory framework of reference.[163] In fact, the position taken by regulators includes the latter in the basic rules on competition, particularly for M&A activities as a commitment to restrain (i) the disruption of existing product pipelines, (ii) the reduction in R&D activity and finally, (iii) the stifling of competition in the market for future products.[164] Digital markets are characterised a fortiori by a singular speed in the way innovation manifests itself; it represents one of the critical drivers for success. Therefore, efficient control is necessary to prevent future damaging impacts that M&As may cause. According to a study by Ivaldi et al. (2023), there would need to be straightforward evidence that operations comprising companies with limited revenues are more likely to be killed than larger ones.[165] This would be the starting point for reforming competition law to take concrete action. It is also pointed out that those advocating for stricter M&A control intervention "have not provided compelling empirical evidence that current merger policy has been too lax".[166] On the other hand, in contrast to the tremendous recent concern about enforcers, the probability of killer acquisitions in digital markets is relatively low.[167] At the same time, Kulick and Card (2023) argue that the current risk is related to the discouragement and slowing down of M&A activities, which would be a major factor for a considerable increase in R&D and consequently represent a crucial driver for innovation.[168] In addition, they call for a cautious approach in relying on theories of anticompetitive harm, as certain transactions are scrutinised and have anticompetitive effects; it is shown that there is a remarkable connection between M&A activity and innovation.[169] From this point of view, it is inferred that one possible side effect of stricter regulators' control is to equally cause

[161] Ishmael Liwanda, *'The Digital Markets Act's Innovation Paradox: Towards a Digital Magna Carta and Leviathan?'* (2024) LSE Law Review 9(2), p. 261 <https://doi.org/10.61315/lselr.652> accessed 7 May 2024.

[162] OECD, 'Competition and Innovation: The Role of Innovation in Enforcement Cases- Summaries of contributions' DAF/COMP/WD(2023)100, p. 6 <https://www.oecd.org/daf/competition/the-role-of-innovation-in-competition-enforcement-2023.pdf> accessed 18 May 2024.

[163] Ibid.

[164] Ibid.

[165] Marc Ivaldi et al, *'Killer Acquisitions: Evidence from EC Merger Cases in Digital Industries'* [2023] Social Science Research Network <https://doi.org/10.2139/ssrn.4407333> accessed 13 May 2024.

[166] Robert W. Crandall et al, *'Antitrust in the Information Economy: Digital Platform Mergers'* (2022) Journal of Law and Economics vol. 65: no. 6, Article 7 <https://chicagounbound.uchicago.edu/jle/vol65/iss6/7> accessed 5 May 2024.

[167] Gautier and Lamesch (n 122).

[168] Robert Kulick, Andrew Card, 'Studying Effects of Mergers on Innovation Using Evidence from R&D Expenditure and Patent Applications' (NERA, 2023) <https://www.nera.com/experience/2023/mergers--industries--and-innovation--evidence-from-r-d-expenditu.html> accessed 18 May 2024.

[169] Ibid.

harm, i.e. inhibiting innovation. Killer acquisitions in the digital market often conceal the intent to prevent disruptive innovations from entering the market. Usually, the routes taken by large tech platforms to achieve this are through integrating the acquired innovations into their existing product line or, alternatively, deciding to stifle them in such a way as to eliminate the potential competitive danger of these. From a strictly innovation-related point of view, these strategies of absorbing potential rivals significantly reduce the incentive to innovate. As was evident in the *Dow/Dupont* case, the Commission undertook a comprehensive analysis of the merger in relation to the innovation incentives resulting from it.[170] The analysis focused precisely on the proximity of the merging parties as innovators and how any successful outcome of the deal could have negative repercussions on innovation in the industry as a whole and, at the same time, on competitors.[171] And that consequently, the damage done to innovation would ultimately be passed on to consumers.[172]

Taking a study by Carugati (2022) as a starting point, it is noteworthy that of the 1149 companies acquired by large digital platforms between 1987 and 2022, only 21 of them have been reviewed by the Commission.[173] The advent of ad hoc regulation in the digital sphere is justified by the need for a proactive approach on the part of regulators, given the illustrated close relationship between innovation and competition and necessarily the prevention of anticompetitive practices. By promoting 'contestability and fairness' in the digital industry, the DMA definitely aims to foster effective competition for innovation.[174] However, it can be argued that the system of do's and dont's with which the DMA impose obligations and prohibitions on gatekeepers, on the other hand, harbours the risk that the very contributions to innovation made by big tech platforms in the digital marketplace will be slowed down if not stopped altogether.[175] Moreover, a notable oversight of the DMA is the apparent neglect of its provisions' potential impact on incumbent platforms' innovation incentives. This omission is a significant gap in the DMA's strategy for ensuring effective competition in the digital marketplace, and it warrants further examination.[176]

[170] *Dow/DuPont* (Case M.7932) Commission Decision 2017/C 353/05 [2017] OJ C 353.
[171] Ibid para 3293.
[172] Ibid.
[173] Carugati (n 96).
[174] EU Digital Markets Act, recital 7.
[175] Liwanda (n 161).
[176] Ibid, p 291.

5 Conclusion

The purpose of this thesis is to analyse the instruments in the EU's possession to counter the threat posed by so-called killer acquisitions. And, with relation to the digital industry, what might be some of the possible consequences on innovation that these concentrations and the interaction between the EU's mechanisms determine. The focus of the work was specifically directed towards two provisions relating to M&A control, Articles 22 of the EUMR and 14 of the DMA, respectively. Furthermore, referring to the research question, it can be argued that the complementarity underlying the two mechanisms allows the control authorities to rely on a pool of instruments to fulfil their objectives. However, in attempting to solve one gap in the jurisdictional mechanism, it is equally evident as the risk of others coming to the surface. The holistic approach undertaken by the Commission to counterbalance the threats posed by the killer acquisitions and the new theories of harm brought about by the digital ecosystem, particularly concerning innovation, overlooks doubts and uncertainties regarding its effectiveness and legal consistency. It is equally true that there is not enough practical evidence of the current legal framework in charge of merger control, considering that the implementation of the DMA, for instance, has only recently taken place. In 2021, the Commission argued that the EUMR's turnover-based jurisdictional threshold, aided by the referral mechanisms, had produced reliable results in intercepting relevant transactions in the European market.[177] However, as much as the individuality of each instrument and/or mechanism available to the EU can be justified, the interaction between them raises concerns that it is probably too early to take this rigorous stance. This situation of possible over-enforcement, or rather expansion of the Commission's jurisdiction over the issues addressed, has recently been criticised by experts. As outlined in Chapters 2 and 3, should AG Emiliou's opinion be followed by the ECJ, we can expect just as many repercussions. First, the novel approach to the referral mechanism under Article 22 EUMR would be affected by a possible further backward recalibration. Consequently, the interaction with the DMA, particularly in relation to Article 14 of the latter, would be affected as the degree of complementarity between the two mechanisms is significant and designed specifically. This would translate that the much-prompted referrals for possible harmful non-reportable transactions by Member States would no longer be possible, or at least not with such apparent sequentiality. In addition, this would inevitably lead regulators to think of further ways and means to effectively address the circumvention threat of the EUMR's quantitative threshold and the more recent concerns of the digital industry.

In the overall dynamism characterising the scenario in which killer acquisitions manifest themselves, what is lacking is legal certainty in many respects. Especially how the rapid evolution of innovative-intensive environments can complicate the fine line between pro- and anti-competitive effects in terms of innovative

[177] Commission Staff Working document, Evaluation of procedural and jurisdictional aspects of EU merger control, 26 March 2021, SWD(2021) 66 final, para 266.

competition. Without neglecting the fact that innovation, just like the killer acquisitions themselves, is characterised by a polyvalent meaning according to the context of reference, and therefore, it remains complicated to provide a harmonised assessment due to the multiple specificities characterising the market. Undoubtedly, the position held by GAFAM firms necessitated proactive intervention on the part of regulators, for the characteristic that in such an environment, under-enforcement rather than over-enforcement seems to be of greater concern. As Cunningham et al (2018) noted, "because killer acquisitions may motivate ex-ante innovation the overall effect of such acquisitions on social welfare remains unclear".[178] This situation adds further question marks and difficulties on both sides concerning a merger. Certainly, the trade-off to be paid as everything seems to be further questioned is translatable into increased costs, timing leading to efficiency losses for the merging activity, the merging parties and consumer welfare. This is why innovation-related effects and consequences of acquisitions should perhaps be approached more cautiously before implementing significant changes in relation to the 'current' system's characterising principles.[179] In conclusion, *de lege ferenda* it is only a matter of waiting for what will be in sight at the EU level.

[178] Cunningham et al. (n 4), p 38.

[179] Jacquelyn MacLennan et al, 'Innocent until Proven Guilty – Five Things You Need to Know about Killer Acquisitions' (Informa Connect, 3 May 2019) <https://informaconnect.com/innocent-until-proven-guilty-five-things-you-need-to-know-about-killer-acquisi-tions/> accessed 20 May 2024.

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