

Killer acquisitions and European merger control in the digital era

Aline Michelle Alves Fulgencio

Master's Thesis in European and International Trade Law

HARN63

Supervisor: Jörgen Hettne

Spring term 2021



**SCHOOL OF
ECONOMICS AND
MANAGEMENT**

Table of Contents

1. Introduction	7
1.1. Background.....	7
1.2. Aim and research questions	9
1.3. Scope and constraints	9
1.4. Materials and method	9
1.5. Structure.....	10
2. US antitrust law contribution to the emergence of the big techs.....	12
2.1. Introduction	12
2.2. Antitrust law historic background	12
2.3. Paradigm shift in the economic and legal analyses	14
2.4. Summary and concluding remarks	16
3. The concept of killer acquisition and the start-ups as targets	18
3.1. Introduction	18
3.2. Definition of a killer acquisition.....	18
3.3. Big Tech companies' strategy	19
3.4. Summary and concluding remarks	21
4. EU merger regulation	22
4.1. Introduction	22
4.2. Historic background	22
4.3. Overview of the Regulation n°139/2004.....	24
4.4. Alternatives for acquisitions under the thresholds	25
4.5. Summary and concluding remarks	26

5. How the Commission tackled the killer acquisitions	28
5.1. Introduction	28
5.2. The new approach for the application of the article 22 of the EUMR ..	28
5.3. Comments on the Commission decision and the Illumina/Grail Case ..	32
5.4. The improvement on capital markets in the EU and its impact on killer acquisitions	35
5.5. Summary and concluding remarks	38
6. Conclusion	40

Abstract

The Big Tech companies, more precisely the five American giants: Google, Apple, Facebook, Amazon and Microsoft, have been performing a massive number of startup acquisitions and strengthening their dominant position in the market. In an economical study about mergers in the pharmaceutical sector the term killer acquisition was firstly adopted to define a transaction in which an incumbent, after acquiring a innovative target, terminates the development of the target's innovations in order to prevent a future competitor. This term has also been employed for the technological sector as a harm theory to determine anticompetitive behaviour. In Europe, it has given raise to concerns because such transactions are not scrutinised by the competition authorities. And that is the reason why there is a lively debate about the necessity or not of the change of the Mergers Regulation in order to prevent the occurrence of killer acquisitions.

This master thesis shows how US antitrust law has been contributing for the growth of such Big Tech companies, allowing them to enhance their dominant position at the expense of society. Its impact on European market is pointed out through the exposition of crucial issues concerning the necessity and the problematic of change of the EU mergers regulation. Furthermore, explanatory comments are given on the Commission's approach in tackling the killer acquisitions. Finally, measures adopted by the European Union outside of the competition policy are presented as being helpful to combat such anticompetitive transactions, but further research is needed in order to bring conclusive results.

Key words: killer acquisitions, mergers control, EU mergers regulation, US antitrust law, digital sector, startups, GAFAM.

Abbreviations

CJEU	Court of Justice of the European Union
CMU	Capital Market Union
EU	European Union
EUMR	European Union Merger Regulation
FCA	French Competition Authority
GAFAM	Google, Apple, Facebook, Amazon and Microsoft
IPO	Initial Public Offering
SME	Small and Medium size companies
US	United States of America

1. Introduction

1.1. Background

The prevalence of some companies in the technological sector, such as Apple, Microsoft, Amazon, Google and Facebook¹ has given rise to a considerable debate all over the world. They are responsible for an enormous and constant number of acquisitions. And since then, concerns have been addressed to the fact that the growing number of start ups acquisitions made by such tech giants are in reality, a strategic way to terminate the competition. This strategy was demonstrated in an economic study about the pharmaceutical sector, in which the term ‘killer acquisitions’ was labeled for the first time² and thenceforth, it has also been used in the tech titans debate.

The platformisation has been impacting the structure of business sectors, once it allows companies to scale rapidly.³ A variety of services provided by these digital infrastructures embodies marketplaces (Amazon), application store (Apple), social network sites (Facebook) and search engines (Google).⁴ In this context, the decisions of a digital platform are made based on the data, which were collected and processed by itself.⁵ Nowadays, data is a fundamental element for empowering who owns it.⁶ Thus, the more users a platform has, the more value it possesses⁷. This phenomenon is called data-driven network effect.⁸ Hence, start ups have been facing a significant challenge to compete with those tech giants.

¹ PWC.Global top 100 companies June 2020.

² Colleen Cunningham, Florian Ederer and Song Ma. Killer Acquisitions. *Journal of Political Economy* (April 19, 2020) Vol. 129, No. 3, pp. 649–702.

³ UNCTAD. Digital Economy Report, 2019 p. 38.

⁴ UNCTAD. Competition issues in the digital economy. TD/B/C.I/CLP/54 p. 2.

⁵ Ibid, p.3.

⁶ Ibid, p. 4.

⁷ Ibid.

⁸ Ibid.

Moreover, when a small company achieves to enter in the market, it is generally acquired by dominant platforms. As a result, current and future competition is undermined by those big companies, while they reinforce at the same time their dominant position on the market.⁹

On the other hand, venture capitalists, which are responsible for funding startups in most cases, tend to consider selling the company as the most advantageous exit strategy, once they can receive the invested amount promptly. That is why selling shares in an Initial Public Offering (IPO) has become very rare.¹⁰ Their reasoning behind their choice is based on the assumption that high-risk investors need to be highly paid, and for that reason dividends from a triumphant start up will not achieve their high ambitions.¹¹ Lemley and McCreary claim that such strategy “short-circuits the development of truly disruptive new technologies that have historically displaced incumbents in innovative industries”¹², classifying these kind of acquisitions as “pathological”.¹³ However, the central point in the present debate is that the expressive majority of acquisitions made by those big techs were not performed under the control of the competition authority framework.

In this context, competition law has been called upon to find solutions for the current situation. In the United States (US) some scholars argued that the emergence of such ‘big techs’ is the result of a misapplication of the antitrust law.¹⁴ In Europe, the principal issue refers to the question if the current EU merger control framework needs to be modified in order to reach such killer acquisitions.¹⁵

⁹ Mark A Glick, Catherine Ruetschlin and Darren Bush, Big Tech’s Buying Spree and the Failed Ideology of Competition Law: The Example of Facebook (December 11, 2020). Hastings Law Journal, Forthcoming, U of Houston Law Center No. 2020-A-42, p.7.

¹⁰ Mark A Lemley and Andrew McCreary. Exit Strategy. Stanford Law and Economics Online Working Paper #542 (December 19, 2019) p.6.

¹¹ Ibid p. 8.

¹² Ibid. p. 1.

¹³ Ibid.

¹⁴ Tim Wu. The Curse of Bigness: antitrust in the new gilded age (Colombia Global Rep. 2018), p. 17-21.

¹⁵ Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, ‘Competition policy for the Digital Era’ (2019), p.110.

1.2. Aim and research questions

The present study aims to analyze the European competition policy and its legal framework regarding mergers and acquisitions with the goal to comment the recent legal measures adopted by the Commission for improving competition in the technological sector, preventing thus the occurrence of the killer acquisitions. In order to do so, the principal research question to be answered is: how to avoid killer acquisitions through European merger control regulation? In addition to that question, the following underling and related questions will be explored: what was the contribution of the US antitrust law for the emergence of the big techs? How to identify a killer acquisition? Are there possible solutions outside of the competition policy?

1.3. Scope and constraints

The present master thesis focuses on the European solutions in the mergers regulation within and outside of the competition policies for tackling the killer acquisitions. The study seeks to show the challenges faced by the EUMR for controlling these acquisitions, bringing an evaluation about its consequences and the Commission recently adopted way for solving these problems. Additionally, it was exposed how the legal structure for mergers control in the US has impacted the practices of the big techs in the world. This study does not investigate the questions concerning the identification of a potential competitor, which are more linked with economic models. Moreover, it also does not deeply investigate the reasons for a startup selling strategy. Finally, it does not provide a comparison between US antitrust and EU merger control.

1.4. Materials and method

In order to show how to avoid killer acquisitions through European mergers control, a traditional legal dogmatic method has been applied to analyse the European mergers regulation n° 4064/89 of 21 December 1989 and n° 139/2004 of 20 January 2004, which constitute the development of the European

competition law framework. The former was the first regulation on concentrations control and it is no longer in force. The latter is in force and has recently undergone a change of its article 22 application. The circumstances leading to the first case of the new application of article 22 EUMR (*Illumina/Grail v. Commission*) will be described, although the Court of Justice of the European Union did not publish any information about it until now. In addition, the same method was employed for studying the American antitrust law, the *Sherman Act* and its subsequent amendments, and legal cases with the goal to investigate the reasons for the growth of the Big Techs without antitrust authorities control. Given that the US is their home country, the investigation of such law provided the understanding for the reasons which led these companies to threaten competition policy all over the world. Besides, the 'Law in Context' method was used to verify the problem of the existence of killer acquisition in the digital sector. The contextual approach implies using a multi-disciplinary perspective to solve a problem¹⁶. In this study it was researched articles of economy which have shown empirically the huge number of startups' acquisitions by GAFAM and the results of such transactions for competition. Finally, a literature review was performed, having as key words: killer acquisitions, European competition law, US antitrust law, digital sector, startups, GAFAM and mergers control.

1.5. Structure

This study begins with the exposition of the problematics of the startups' massive acquisitions by the Big Tech companies, more specifically by Google, Apple, Facebook, Amazon and Microsoft (GAFAM). In the second chapter it is shown the origin and evolution of the antitrust law in the US and the legal aspects that made such companies achieve the actual position in the market, allowing their practices *vis-à-vis* the small companies. In chapter three an explanation about the term 'killer acquisition' is provided in order to specify the pertinent characters for the technological sector. Moreover, the anticompetitive practices concerning the startups acquisitions by GAFAM are commented. Chapter four starts with a

¹⁶ Philip Selznick, *Law in Context Revised*, Journal of Law and Society, Vol. 30, No. 2 (Jun., 2003), p. 179

contextualisation of the adoption of the European merger regulation with a historic background leading to the current regulation application and its issues concerning the failure for controlling the killer acquisitions. In addition, the merger legislation of Germany and Austria are mentioned for showing their legal solutions regarding the killer acquisitions. Chapter five describes the new application of the article 22 of the European Mergers Regulation (EUMR) adopted by the Commission for tackling those damaging acquisitions, presenting the criticism expressed, mainly by lawyers, but also exposing the author's arguments in support of Commission's decision. Moreover, the first case involving this new application of the article 22 EUMR is commented, as well as the Commission's actions beyond of the competition policy, which have impact for preventing killer acquisitions. Chapter six presents the conclusions of this thesis.

2. US antitrust law contribution to the emergence of the big techs

2.1. Introduction

The goal of this chapter is to give an overview of the US antitrust law in order to better understand the big techs phenomenon, responding to the question: what was the contribution of the antitrust law for the emergence of the big techs? It will be demonstrated the gap in American antitrust law, which has not kept pace with the evolution of the digital market, prevented the control of GAFAM's anticompetitive behaviour by competition authorities in this country, a fact which has impacted the European market.

2.2. Antitrust law historic background

The term antitrust originated in the US from their trust-busting policies of the late nineteenth century.¹⁷ After the American civil war (1861-1865) large companies constituted under the form of trusts emerged in different sectors of the economy, such as railroads, petroleum, sugar, steel and cotton.¹⁸ In the railroads sector, for instance, the railway monopoly imposed abusive prices to farmers, who were the main victims in comparison to large industrial companies, for transporting their products.¹⁹ In 1890, the *Sherman Act* —the first antitrust law in the US— was promulgated aiming to restrict the power of such trusts.²⁰ Due to its flexible language and wide vocabulary, this law has the necessity to be interpreted by the tribunals and remains applicable until nowadays.²¹

¹⁷ Daniel L. Rubinfeld, *Antitrust Policy: Lessons from the US*. International Encyclopedia of the Social & Behavioral Sciences (Second Edition), Elsevier, 2015 p. 796.

¹⁸ Ibid.

¹⁹ Vincent Martenet et Andreas Heinemann. *Droit de la concurrence*. Chappuis Christine et al. (édit.) Collection *Quid Iuris*, Genève/Zurich/Bâle, Bruxelles, Paris. (Schulthess, L.G.D.J., Bruylant, 2012) p. 7.

²⁰ See note 17.

²¹ See note 19, p. 8.

It is worth underlining that after the promulgation of this law, the number of mergers raised dramatically.²² Therefore, in 1914, the *Sherman Act* was complemented by the *Clayton Act*, which introduced the mergers control²³, as well as specific rules aiming at determinating conducts believed to threaten competition, as price discrimination and predatory pricing (modified by *Robinson-Patman Act* in 1936).²⁴ In addition, the *Celler-Kefauver Act* was adopted in 1950 embodying all mergers and acquisitions.

The *FTC Act* was also adopted in 1914, implementing the Federal Trade Commission (FTC) as the regulatory authority for antitrust law.²⁵ Its Section 5, can be used to consumer protection and mergers. Moreover, the FTC has the competence to enforce the *Clayton Act* and the *Robinson-Patman Act*.²⁶ As regards the Clayton Act, it is significant to mention that the *a priori* merger control was introduced by the *Hart-Scott-Rodino Antitrust Act* only in 1976.²⁷

During this early period of the antitrust development, a crucial analysis distinction for determining the legality of agreements was made by the Court: the *per se* (case *Socony-Vacuum Oil* in 1940)²⁸ and the *rule of reason* (case *Standard Oil* in 1911)²⁹. The former refers to certain practices presumed to violate antitrust law, regardless other factors. The later refer to the examination of positive and negative effects of such agreements, taking into account the general, economic and legal contexts.³⁰ It is noteworthy, however, that the economic approach for

²² See note 17.

²³ See note 19, p. 9.

²⁴ See note 17, p. 797.

²⁵ See note 19, p. 8.

²⁶ See note 19.

²⁷ See note 19.

²⁸ *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150 (1940).

²⁹ *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1910).

³⁰ See note 19.

antitrust concerns was in the centre of the analysis³¹ and this fact has a huge relevance for the development of the big techs, as it will be discussed later.

2.3. Paradigm shift in the economic and legal analyses

The predominance of the Harvard School thinking was mainly expressed by the research of professors Edward S. Mason and Joe S. Bain until the end of the sixty's.³² This period was featured by the antitrust public enforcement, which was expanded thanks to the work of Thurman W. Arnold, chairman of the Department of Justice Antitrust Division since 1938.³³

The above mentioned scholars alleged that anticompetitive conducts, such as creating barriers to entry in the market should be held illegal by the Courts, once these barriers could be manipulated by dominant firms in order to preserve their incumbent market position. As a result, there would be the emergence of oligopolies and supra competitive pricing.³⁴ They justified an interventionist approach to antitrust policy. In this period of the antitrust enforcement, it was believed that the restraints limiting the competitor's numbers implied necessarily the increase of prices.³⁵

However, by the beginning of seventy's, the criticism over the active enforcement and the interventionist approach gained strength in the Chicago University, originating the so called, Chicago School antitrust policy.³⁶ Robert Bork, Richard Posner and Frank Easterbrook were its more prominent representatives.³⁷ According to these scholars, markets should functioning with less interventionism, i.e. only price fixing or market division should be prohibited.³⁸

³¹ See note 17.

³² Sawyer Laura Phillips, US Antitrust Law and Policy in Historical Perspective. Harvard Business School Working Paper #19-110, May 2019, p. 16.

³³ Ibid.

³⁴ Ibid.

³⁵ See note 17, p.798.

³⁶ See note 31, p. 18.

³⁷ Ibid.

³⁸ Ibid.

The given reason for such a thinking was, among others, that no company would be able to dominate for a long time a market free of collusion, once the market competition regulates itself.

Since the Court adoption of the Chicago school view, the section 1 and 2 of the *Sherman Act* requires a higher standard to prove a collusion towards restraining trade or monopolising the market. At the same time, the screening of corporate mergers became less rigorous by the Court.³⁹ In addition, over time many scholars have endorsed this view with different theories. The theory of the firm, elaborated by Ronald Coase, was one of them. Coase advocated that “(...) direct government regulations will not necessarily give better results than leaving the problem to be solved by markets or the firms.”⁴⁰

Under US antitrust law the proof of the existence of acts of monopolization is the principal requirement for controlling companies in a dominant position performing anticompetitive conducts. “These dominant platforms are often gatekeepers, which compete with the businesses that they host on their platforms. Not atypically they prioritize the platforms’ own offering to those of the rivals.”⁴¹ Such practices are considered unfair and anticompetitive by scholars⁴², but not under the American law. Besides, the determination of what is an anticompetitive conduct by the Court “depends on complicated theories of harm and implicates teams of economists and lawyers.”⁴³ Currently, the Section 2 of the *Sherman Act* has been used for solving cases of anticompetitive behaviour practiced by dominant platforms. However, as Eleonor Fox and Harry First explain, it is not at all efficient against such companies due to the weak legal doctrine and long litigation time.

³⁹ Ibid, p. 20.

⁴⁰ Ronald Coase, *The Firm, the Market, and the Law*, University of Chicago Press (1990), p. 118.

⁴¹ Eleonor M Fox and Harry First, *We Need Rules to Rein in Big Tech* (October 27, 2020). *CPI Antitrust Chronicle* October 2020, NYU Law and Economics Research Paper No. 20-46, p. 3.

⁴² Eleonor M Fox and Harry First have expressed this position.

⁴³ Eleonor M Fox and Harry First, *We Need Rules to Rein in Big Tech* (October 27, 2020), p.3

The case-by-case process in general has much merit. Cases against the platforms should of course proceed. But the litigation process will be too long and too uncertain, and will proceed under jurisprudence that is too indulgent to incumbents, to trust it as a fruitful route to control the GAFA.⁴⁴

Thus, as the Supreme Court became much more tolerant to dominant companies in its analysis, since such a proof is very hard to be achieved by the plaintiffs. It follows that under US antitrust law there is no legal framework able to prevent harmful behaviour cause by GAFAM to the consumers, to their competitors and to the market as a whole. The antitrust law lag led such companies to an exponential growth at the expense of society. The problem arises because it crossed the borders of the country and those companies became dominant globally.

2.4. Summary and concluding remarks

This chapter has shown that the *Sherman Act* from 1890 was the first antitrust law in the US with the scope to restrict the power of some big companies of that period, called trusts. As a result, there was a sharp increase of mergers. This led to the amendment of the *Sherman Act* by the *Clayton Act* in 1914, introducing the mergers control in this country and restraining the conducts of price discrimination. Afterwards it was modified by the *Robinson-Patman Act* in 1936, introducing predatory pricing practices as anticompetitive. In this period, there was a distinction for determining the legality of the mergers agreements. The *per se* analysis takes into account practices that presumedly violates antitrust law, without considering other factors. The *rule of reason* takes into account the positives and negatives effects of those agreements in the general, economic and legal contexts. But the Court was always centered in the economic approach for its analysis.

After the establishment of the antitrust law and until the late sixty's the dominant ideology was the so called Harvard School, which was featured mainly by the antitrust public enforcement and by an interventionist approach to the antitrust policy. In this period, it was believed that the raise of the prices was a certain

⁴⁴ Ibid.

consequence of the barriers limitation to the competitor's numbers in the market. The next period, on the other hand, was dominated by the Chicago School, which defended the self regulation of the market and the minimum interventionism. With the adoption of this school's view by the Supreme Court the screening of corporate mergers become less rigorous by the Court. Moreover, under US antitrust law the only way to catch anticompetitive conducts done by dominant position companies is by proving the existence of acts of monopoly. The most significant issue in US mergers regulation for the Big Techs is that their power based on the platformisation does not fit the legal standard to be deemed as monopolization practices. The antitrust law lag leads to the situation of legal impossibility to restrain harmful conducts of those companies, allowing their exponential growth at the expense of the consumers, the market and the small companies. The problem is that the dominance of GAFAM achieved a global level, bringing the harmful results of their anticompetitive practices to the whole world.

3. The concept of killer acquisition and the start-ups as targets

3.1. Introduction

The goal of this section is to provide the concept of killer acquisitions applied to the tech sector and to show the reasons for start-ups acquisitions by Big Tech companies.

3.2. Definition of a killer acquisition

The first definition was given by Colleen Cunningham, Florian Ederer and Song Ma in their paper titled with the same name. According to this study, a killer acquisition occurs when there is an acquisition of an innovative target resulting in the end of that innovation because the incumbent aims to prevent such competition.⁴⁵ The authors explain that this definition referred to horizontal mergers in the pharmaceutical sector.

In the technological sector, however, it is significant to make a differentiation between established companies and small growing companies. For a sector adequate definition, it is necessary to take into account only these small companies as targets. These growing companies, called startups, present the followings characteristics: they are younger than ten years, they have an innovative product and/or service and/or business model and they aim to scale up (intention to grow the number of employees and/or turnover and/or markets in which they operate).⁴⁶ Moreover they play a central role for Big Tech expansion and competition. Thus, it is possible to transplant the term for digital markets, as it was explained above taking into account the size, age and innovative effectiveness of the targets.

⁴⁵ Colleen Cunningham, Florian Ederer and Song Ma. Killer Acquisitions. *Journal of Political Economy* (April 19, 2020) Vol. 129, No. 3, p. 1.

⁴⁶ European Startup Monitor 2019/2020, p.1.

In addition to this, it is worth mentioning that the term ‘killer acquisition’ does not reflect a type of acquisition, but it refers to a theory of harm.⁴⁷ Two theories explain the phenomenon: the killer acquisition theory of harm and the nascent potential competitor theory of harm.⁴⁸ According to a research published by the OECD, the former is defined as the one in which the product or service itself is killed, and as a result, the competition as well. The latter theory is defined as the one in which only the competition is killed, once the product or service subsists.⁴⁹ For the purpose of this research, both theories will be taken into account.

3.3. Big Tech companies’ strategy

For start-ups, innovation and efficiency is a *sine qua non* condition to succeed, attracting thus investors. Nowadays, the success of such start-ups is almost always featured by its acquisition through bigger and established companies in the market. Concerns have been raised, due the fact that Big Tech companies, specially Google, Apple, Facebook, Amazon and Microsoft (GAFAM) have been performing a huge number of acquisitions, strengthening their dominant positions without being controlled by competition authorities. But how could these small companies threaten those giants? First of all, it is convenient to understand how digital markets work. Then, it will be possible to unveil the strategy of Big Tech companies.

In digital markets, the facility to duplicate and to distribute contents lead to a increase in return to scale.⁵⁰ The central feature of this market is that “the average net revenue per user increases with the total number of users because of the existence of demand-driven network effects.”⁵¹ Hence, the number of users determine the value of a digital platform. In addition, a company is in a best competing position comparing to others, when it possesses the consumers’ believe

⁴⁷ OECD (2020). Start-ups, Killer Acquisitions and Merger Control, p.10.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Bruno Jullien and Wilfried Sand-Zantman. The Economics of Platforms: A Theory Guide for Competition Policy (September 24, 2019). TSE Digital Center Policy Papers series, No.1, 2019, p. 5.

⁵¹ Ibid.

that it has high sales.⁵² Nevertheless, a new small company can draw consumer attention through its high-visible innovation.⁵³ And “if pattern prevail, leapfrog innovation might allow an entrant that is small today to generate a positive feedback cycle and overcome the various scale advantages of an incumbent.”⁵⁴ This fact may occur, even if the target and incumbent have different products, leading to a competition.

When it comes to GAFAM’s acquisition strategy, the type of the acquired asset may indicate the purpose of such transactions.⁵⁵ It can aim to incorporate a new technology, with its integration in the core of their functionalities, leading to the disappearance of products. It can aim to aggregate more consumers (platform users), leading to the continuity of the acquired product. It also can have the goal of hiring high skilled employees.⁵⁶ In all the mentioned cases, it may contain a killer acquisition as a behind reasoning.

In an recent empirical study, it was demonstrated that targets acquired by GAFAM between 2015 and 2017, on average, completed two funding rounds, gathered \$7 million and was at an age of four.⁵⁷ In addition, the majority of these targets were in the central sector of the incumbents or in complementary sectors. This fact suggests that the goal with these transactions was to reinforce their dominant position. Moreover, it is possible to suppose the existence of a killer acquisition strategy because the study has shown that 60% of the target’s products disappeared within a year after the acquisition by GAFAM.⁵⁸ What led the authors to conclude that “younger firms are less likely to be continued. Indeed, younger

⁵² Michael L Katz, Big-Tech Mergers: Innovation, Competition for the Market, and the Acquisition of Emerging Competitors (July 21, 2020), p. 2.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Geoffrey Parker, Georgios Petropoulos and Marshall Van Alstyne (2021) ‘Platform mergers and antitrust, *Working Paper* 40796 , 01/2021, Bruegel, p. 12.

⁵⁶ Axel Gautier and Joe Lamesch. Mergers in the Digital Economy (2020). CESifo Working Paper No. 8056, p. 3.

⁵⁷ Ibid, p.14.

⁵⁸ Ibid, p. 23.

startups are more likely to be bought for their knowledge rather than their products, making shutdown more likely.”⁵⁹

3.4. Summary and concluding remarks

This chapter presented the term killer acquisition, as it was firstly employed by Colleen Cunningham on his investigation about the mergers in the pharmaceutical sector. He explained that this term refers to the end of the innovation of the acquired target because the incumbent desires the end of the competition with such a transaction. In the technological sector, the term refers to the startups bought by the Big Techs (GAFAM).

Additionally, it was discussed the dynamics of the technological markets, leading to the killer acquisitions. The startups, although small, can draw the attention of the consumers due to its specific innovation, accumulating a huge number of users as a result of the demand-driven network effect. This may threaten the big techs, which can explain the startups acquisition on the ground of the aggregation of a new technology, of more consumers or for hiring skilled employees. The first reason, generally implies the disappearance of the target product. While for the other two the products do not disappear. But, such reasons can in reality hide a motivation of a competition extinction. An empirical study conducted by Gautier and Lamesch shows that 60% of the innovative products from targets disappeared within a year after their acquisition by GAFAM.⁶⁰ This suggests that in the technological sector the killer acquisition is still a successful strategy to reinforce their dominant position.

⁵⁹ Ibid, p. 24.

⁶⁰ See note 54

4. EU merger regulation

4.1. Introduction

In this chapter the establishment and development of the merger regulation in Europe will be presented, as well as the current academic debate on the possibility of the regulation's modification in order to tackle killer acquisitions.

4.2. Historic background

The treaty of Paris, signed in 1951, creating the European Coal and Steel Community was the first legal source in Europe which referred to a merger control. Its article 66 entitled the Commission to perform concentration control concerning only the sectors it was applied.⁶¹ However, this provision was not included in the Treaty of Rome, which originated the European Economic Community (EEC). Instead, a regulation implementing articles 85 and 86 (at present articles 101 and 102) was adopted in 1962, because it was much more compatible with the goals of the treaty, namely to achieve economic expansion and integration.⁶² Those articles were the foundations of competition law in the EU and they were also used for merger control.

Over the time, and with the elucidations of the judgements from the European Court of Justice (CJEU), the Commission realised that it was not possible to apply article 102 (abuse of dominant position) for all merger cases. It was specially problematic the fact that the Commission was not able to ask for a pre-notification of the mergers due to the lack of such a specific regulation.⁶³ Thus, in 1973 a proposal was made to the Council of Ministers for a regulation based on article

⁶¹ Ioannis Kokkoris and Howard Shelanski. EU merger control- A legal and economic analysis. Oxford University Press 2014 p.17.

⁶² Ibid.

⁶³ Ibid, p.23.

103 of the Treaty. More than one decade later, the regulation 4064/89 was adopted and came into force in September of 1990.

This regulation gave to the Commission the exclusive competence over mergers analysis, what was known as the principle of the one-stop-shop.⁶⁴ The Merger Task Force staff was responsible for appraising the notified mergers and gave proof of its exceptional efficient work, having had only one decision annulled by European Courts until 2002.⁶⁵

According to this regulation, a merger is considerate to have a Community dimension if the aggregate worldwide turnover of all involved parts is more than five billions Euros and the aggregate Community-wide turnover of each or of at least two of the undertakings concerned is more than 250 millions of Euros.⁶⁶ In 1998 smaller thresholds were introduced as an alternative for reaching the Community dimension criterion.

The dominance test was performed by the Commission, which not only analysed the position of the undertaking in the market for determining the creation of a dominance —what was prohibited by the regulation— but also the economic impact of the transaction.⁶⁷ The regulation was silent about situations of potential collective dominance, but through the CJEU case law, its application in such situations was confirmed.

Since the first merger prohibition in 1991, the Commission started to grow the number of such prohibitions. And although the majority of the appeals from its decision did not succeed, two of its decisions were annulled by the General Court in 2002.⁶⁸ This fact corroborated for the reform which culminated in a new and more complete regulation.

⁶⁴ Nicolas Levy. EU Merger Control: from birth to adolescence. Kluwer Law International, 26(2) : 195-218, 2003, p. 198.

⁶⁵ See note 43, p. 81.

⁶⁶ Council Regulation 4064/89 of 21 December 1989, on the control of concentrations between undertakings, 1990 OJ L257/13, article 1.

⁶⁷ See note 43, p.27.

⁶⁸ See note 43, p. 30.

4.3. Overview of the Regulation n°139/2004

The Council Regulation n° 139/2004 came into force in May 2004 and aimed, among other things, to introduce a more economic approach for merger analysis. A guideline on the assessment of horizontal mergers issued on January 2004 complemented that regulation. Such reforms were accelerated after the Commission's failure, as declared by the General Court, in the cases *Airtours/First Choice*, *Schneider/Legrand* and *Tetra Laval/Sidel*.⁶⁹ One of the problems faced by the Commission was that the dominance test did not allow to reach situations where there was a reduction of effective competition without the creation of a dominant position. For that reason, the Commission has adopted the Significant Impediment to Effective Competition (SIEC) test, eliminating dominance as a necessary condition.⁷⁰ Thus, "the new test focuses more directly on the principal economic question raised by a merger, namely whether competition is likely to be reduced."⁷¹

Moreover, the principle of one-stop-shop was conserved, although the Merger Task Force gave place to another organisational structure, in which the Directorate General for Competition has an economist as the chief.⁷² Another crucial modification was the introduction of the reasoned referral, by which the undertakings inform the Commission that the concentration may significantly affect competition in a market within a Member State which presents all the characteristics of a distinct market and should therefore be examined by that Member State.⁷³ In addition, the article 9 (so called German clause) established the exclusive merger control competence of Member States for concentrations that have not a community dimension.⁷⁴ There was, however, an exception to this rule: the possibility of the creation of a dominant position in one single Member State,

⁶⁹ See note 43, p. 50-59.

⁷⁰ Lars-Hendrik Röller and Miguel De La Mano. The impact of the new substantive test in European merger control. *European Competition Journal* pp. 9-28, 2006, p. 20.

⁷¹ *Ibid.*

⁷² Fox and First, *We Need Rules to Rein in Big Tech* (October 27, 2020), p.3

⁷³ Council Regulation (EC) No 139/2004, article 4 paragraph 4.

⁷⁴ *Ibid.*, article 9.

allowed this State to ask for the Commission's intervention.⁷⁵ This exception became known as the Dutch clause. Finally, the thresholds were maintained.

4.4. Alternatives for acquisitions under the thresholds

The massive acquisitions performed by GAFAM were not under the scrutiny of the competition authorities. It was due to the fact that the thresholds established by the EUMR are based on companies turnover, and tech start ups do not possess enough turnover to trigger this regulation. In order to include such transactions in the scrutiny regulation, Germany and Austria have introduced a threshold based on transaction value instead of lowering turnover based thresholds. The last option was considered to be inconvenient, since it could seriously raise administrative burden for merging parties and competition authorities due the fact that it would embody the targets that could be considered a prey in a killer acquisition, but also targets that are not.⁷⁶

In Germany, the Act against Restriction of Competition (Gesetz gegen Wettbewerbsbeschränkungen) is in force since January 1958. Progressively, this Act has undergone a total of ten changes until 2017, when a new modification was approved and came into force in January 2021.⁷⁷ The principal modifications concerning the Big Techs were the possibility of intervention at an early stage by the Federal Office for Cartels (Bundeskartellamt) in the event of competition threats from certain large digital corporations and new thresholds. The former was introduced by article 19a and the latter by article 35, paragraph 1a.

Regarding the new threshold, article 35 (1a) determines the occurrence of concentration control when “the combined aggregate worldwide turnover of all the undertakings concerned was more than EUR 500 million”⁷⁸ and “in the last business year preceding the concentration: a) the domestic turnover of one

⁷⁵ Ibid, article 22.

⁷⁶ Mats Holmström, Jorge Padilla, Robin Stitzing and Pekka Sääskilahti. Killer Acquisitions? The Debate on Merger Control for Digital Markets (2018). 2018 Yearbook of the Finnish Competition Law Association, p. 13.

⁷⁷ Bundeskartellamt website

⁷⁸ Gesetz gegen Wettbewerbsbeschränkungen, art. 35, paragraph 1, 1.

undertaking concerned was more than EUR 25 million and b) neither the target undertaking nor any other undertaking concerned achieved a domestic turnover of more than EUR 5 million”⁷⁹. In addition, such control is still applied when “the consideration for the acquisition exceeds EUR 400 million and the target undertaking has substantial operations in Germany.”⁸⁰

The Federal Republic of Austria has also approved the modification of its Act against Restriction of Competition in 2017, introducing new thresholds based on transaction value. This is to be applied subsidiarily to the turnover and when:

“(…)1. the undertakings concerned achieved an aggregate worldwide turnover of more than EUR 300 million in the last business year preceding the transaction, 2. the undertakings concerned achieved an aggregate domestic turnover of more than EUR 15 million in the last business year preceding the transaction, 3. the value of the transaction is more than EUR 200 million, and 4. the undertaking to be acquired is active to a large extent on the domestic market.”⁸¹

4.5. Summary and concluding remarks

In this chapter it was shown the establishment of the merger regulation in the European Union and how this evolved until the current regulation, emphasising its difficulty for controlling killer acquisitions. In addition, the German and Austrian merger law are commented as alternatives for catching such acquisitions.

In 1990 the first regulation for mergers control (n°4064/89) was implemented in the EU. Under this regulation, the Commission has won the exclusive competence over mergers analysis and the creation of a dominant position was prohibited. A reform initiated in 2002 culminated in the regulation 139/2004, which came into force in May 2004. The main change was the adoption of the Significant Impediment to Effective Competition (SIEC) test, replacing the dominance test. This new test is focused on the economic question if the competition is likely to be reduced or not. Moreover, other significant modifications were also

⁷⁹ Ibid, paragraph 1a, 2 (a) and (b).

⁸⁰ Ibid, paragraph 1a, 3 and 4.

⁸¹ Bundeswettbewerbsbehörde, 2018. Digitalization, Transaction Value Thresholds in Merger Control and Associated Challenges, mentioning art. 9 (4) Kartellgesetz , p. 3-4.

implemented, as the exclusive merger control competence for Member States for concentrations without a Community dimension (German clause) and the possibility of a Member State to ask to Commission intervention when there is a creation of a dominant position within this Member State (Dutch clause). The Community dimension thresholds based on the turnover stayed unmodified. However, these thresholds are not able to catch the killer acquisitions. Therefore, Germany and Austria have introduced in their regulations, a threshold based on transaction value. They are the first Member States to change their regulation allowing their competition authorities to control such anticompetitive acquisitions.

5. How the Commission tackled the killer acquisitions

5.1. Introduction

In this chapter it will be presented the initial solution given by the Commission to access the killer acquisitions as well as comments about such a decision and the possibility of improving competition policy by alternatives to the joint venture option for financing startups.

5.2. The new approach for the application of the article 22 of the EUMR

On March 26 this year, the Commission published an announcement regarding its new approach for the application of article 22 of the regulation 139/2004. The article establishes that a Member State may refer concentrations that do not have a Community dimension to the Commission, when two conditions are met: it affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request.⁸² This article became known as the Dutch clause, as it was briefly explained on the section 4.3 above.

The motive for the article is that some Member States did not have a national merger control regulation when the EUMR was introduced. It was the case of the Netherlands and the referral to the Commission was the solution for avoiding competition distortions. However, this article was rarely used since its creation, until December of 2017, only thirty-three requests were made on its base and four of them were refused.⁸³ One of the reasons for its seldom use was the Commission approach, which discouraged Member States for doing so when the transaction

⁸² Council Regulation (EC) No 139/2004 of 20 January 2004, article 22.

⁸³ Wish Richard and Bailey David. *Competition Law* (Oxford Univ. Press 9th ed. 2018), p. 871-872.

did not exceed the notification thresholds at the national level. But since the occurrence of concerns about the massive acquisitions performed by GAFAM, the Commission has sought to find a solution to access these acquisitions, which could represent a threat for competition in specific cases.

In 2019 the Commission requested an expert report for knowing how competition policy should evolve to continue to promote pro-consumer innovation in the digital age. In this document, entitled *Competition policy for the digital era*, the authors argue that it would be more convenient to monitor the Member States which have adopted a transaction value-based threshold than changing the EUMR at this moment.⁸⁴ The final suggestion for the Commission regarding the killer acquisitions was that:

We consider that, against this setting and in light of the difficulties that the introduction of a non-turnover-based threshold into the EUMR would raise, the EU should wait and assess a) how the new transaction value-based thresholds in Austria and Germany play out in practice, and b) whether the referral system would ensure that transactions of EU-wide relevance are ultimately analysed at EU level. Only if major gaps arise should the EUMR be amended.⁸⁵

Then, in September 2020 the Commission announced that it will accept referrals from Member States according to article 22 EUMR, even though such transactions did not meet national thresholds for doing so, since the conditions of such articles are met.⁸⁶ This first announcement was a preview of the Commission's subsequent decision to maintain the threshold and to extend the approach for the application of the Dutch clause. And in March this year the Commission detailed how the new application of article 22 should be done in a document called "Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases", which will be described in the paragraphs below.

⁸⁴ Jacques Crémer, Yves-Alexandre Montjoye and Heike Schweitzer. *Competition policy for the Digital Era*(2019), p.112.

⁸⁵ Ibid, p.115.

⁸⁶ Commissioner Vestager. *The future of EU Merger Control*. International Bar Association 24th Annual Competition Conference, September 11, 2020

As already mentioned, for the application of article 22 of EUMR two criteria need to be combined. For that, the transaction needs to affect trade between Member States and threaten to significantly affect competition within the territory of the Member State or States making the request. The first condition is fulfilled when the transaction “is liable to have some discernible influence on the pattern of trade between Member States”⁸⁷ and the second when the referring Member States achieve to demonstrate, preliminarily, that “there is a real risk that the transaction may have a significant adverse impact on competition, and thus it deserves close scrutiny.”⁸⁸

Moreover, the Guidance clarifies that for the preliminary evidence, for deciding whether the transaction threatens to significantly affect competition, such situations can be considered:

the creation or strengthening of a dominant position of one of the undertakings concerned; the elimination of an important competitive force, including the elimination of a recent or future entrant or the merger between two important innovators; the reduction of competitors’ ability and/or incentive to compete, including by making their entry or expansion more difficult or by hampering their access to supplies or markets; or the ability and incentive to leverage a strong market position from one market to another by means of tying or bundling or other exclusionary practices.⁸⁹

The Guidance explicitly refers to the killer acquisitions, without using this term, mentioning the startups acquisitions among the cases that will be acceptable for being referred. The document specifies that transactions involving targets, which turnover does not reflect its actual or future competitive potential⁹⁰ are in the centre of its goal. But, it is not only those, it also embodies transactions where one of the undertakings is

⁸⁷ European Commission. Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases (2021) p.4.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Ibid, p. 5.

“(…) an important innovator or is conducting potentially important research; is an actual or potential important competitive force has access to competitively significant assets (such as for instance raw materials, infrastructure, data or intellectual property rights); and/or provides products or services that are key inputs/components for other industries.”⁹¹

In addition, the Commission can analyse the value received by the seller and verify whether it is much higher than its turnover, as an assessment criterion.⁹²

Another significant aspect is that a referral may be done by a Member State within six months after the concentration execution. However, this deadline admit exceptions depending on special circumstances. It was mentioned the magnitude of the potential competition concerns and also the potential harmful impact on consumers⁹³, but these are examples, suggesting that the Commission can establish other circumstances according to its assessment.

The Commission ensured the legal certainty when stated that a transaction already notified in one or more Member States makes a referral request unlikely to be accepted. Regarding procedural aspects, it is admissible the communication of a concentration made by a third part in the transaction to a national competition authority or to the Commission⁹⁴, providing preliminary evidence in this communication. Nevertheless, neither the national authorities nor the Commission are binding to take any action after such a communication.⁹⁵ Additionally, the merging parties can voluntary inform them about their transaction intentions. And if sufficient information to make a preliminary assessment has been submitted, the Commission can give them an early indication if this transaction would be or not accepted for a referral.⁹⁶ The document also clarifies questions about deadlines, which, for the purpose of this study, are not relevant to be mentioned.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Ibid, p. 6.

⁹⁵ Ibid.

⁹⁶ Ibid.

5.3. Comments on the Commission decision and the Illumina/Grail Case

The Guidance described above shows that the Commission is on the cautious side in comparison with the measures adopted by Germany and Austria. Such a decision is comprehensible, since the EUMR change intending to add a non-turnover based threshold has many complex implications. The right balance between the criteria for a transaction notification and the necessity of running down costs and administrative burden is one of them.⁹⁷ Moreover, finding the ideal transaction value threshold for avoiding to catch several insignificant acquisitions and at the same time to be able to scrutinize the killer acquisitions is a jurisdictional challenge, regarding the maintenance of the legal certainty.⁹⁸ On the other hand, the Commission explicitly said that it is willing to do the necessary change, if the adopted measure does not show effectiveness for tackling the killer acquisitions. It was said in the Guidance as: “The Commission may revise this Guidance at any time in light of future developments.”⁹⁹

Some lawyers have already found problems with this new application of article 22. They allege, among other things, that: a) it bypasses the Member States view of which transactions pose a threat to competition, b) it imposes resource burdens on Member States once they will need to monitor transactions which are not reportable under their own laws, c) it poses conflicts with the EU principle of subsidiarity because the Commission has now the power to review transactions which are legally insignificant under national laws.¹⁰⁰ Other lawyers affirm that the new approach of article 22 is in fact a copy of the UK’s approach of jurisdictional uncertainty and that this Guidance has as practical effects the increase in unpredictability and the lack of legal certainty for deals.¹⁰¹ It seems

⁹⁷ See note 15, p. 114.

⁹⁸ Ibid.

⁹⁹ See note 84, p. 1.

¹⁰⁰ Fried Frank Antitrust and Competition Law Alert n° 21/04/16. Reinvention of the Dutch Clause: The European Commission Takes Merger Control Jurisdiction Over Non-Reportable Deals. Fried, Frank, Harris, Shriver & Jacobson LLP, p. 1.

¹⁰¹ www.freshfields.com <The European Commission publishes guidance on its broadened Member State referral system – but unpredictability and uncertainty remains>.

clear however, that the Commission took the right way in doing so. Firstly, because of the factor time. How much time would be needed for finding the ideal threshold? While waiting for that, the killer acquisitions continue to happen in a frenetic rhythm diminishing thus the potential concurrence in the market and consumers welfare. Secondly, because taking into account the severity of the repercussions of a killer acquisition, the public interest justifies the additional work of the Member States in seeking transactions which do not achieve the threshold of their legislations, but potentially harmful for the society.

The fact is that the first case following the new application of article 22 EUMR started already in February of 2021, when the Commission invited the Member States to make a referral of the Illumina/Grail transaction. Illumina is a leading multinational company based in the US, which develops, manufactures and markets integrated systems for the large scale analysis of genetic variation and biological function.¹⁰² Grail in turn, is an American biotechnology company founded in 2015 by Illumina, which holds 12% of the Grail's shares.¹⁰³ This cancer-detect startup became a standalone company, receiving investments from, i.a., Bill Gates and Jeff Bezos, and does not possess offices in Europe, neither has a product on the market. In September 2020, the acquisition of Grail by Illumina for the amount of US\$ 7.1 billion was announced. Subsequently, in March this year, the Federal Trade Commission filed an administrative complaint, authorising a federal court lawsuit to block this transaction.¹⁰⁴ And in the same month the French Competition Authority (FCA) requested the referral in response of the Commission's invitation. The national authorities of Belgium, Greece, the Netherlands, Iceland and Norway joined the request. In response, Illumina and Grail challenged the FCA and the Dutch Competition Authority before the respective national courts, claiming before the French court that the deadline of 15-working days to make a request was not observed by the FCA, that the undertakings were not consulted about the transaction and that the FCA made an

¹⁰² www.bloomberg.com/quote/ILMN:US

¹⁰³ www.bnnbloomberg.ca

¹⁰⁴ www.ftc.gov

error considering this acquisition as potentially harmful for competition.¹⁰⁵ Before the Dutch court they alleged that article 22 EUMR could not be invoked by Member States without domestic jurisdiction, that this authority violates its own procedural rules when jointed the referral, and that the conditions of article 22 EUMR were not met.¹⁰⁶

The national courts dismissed the allegations, under different arguments. The French court stated that the national judge was not competent to decide such appeal, since this request is not detachable from the transaction assessment made by the Commission, which is under the control of the European Court of Justice.¹⁰⁷ The Dutch court argued that the period of 15 working days is applicable when the Member State wants to refer the transaction, after the notification of such transaction, that was not the case. The court has thus dismissed all the allegations, deciding that the Dutch competition authority jointed legally the request.¹⁰⁸ The Commission accepted the request made by the national competition authorities in April of this year and asked Illumina to notify the Grail acquisition. According to the reasons given by the Commission, the conditions of article 22 EUMR were met because “the combined entity could restrict access to or increase prices of next generation sequencers and reagents to the detriment of GRAIL's rivals active in genomic cancer tests following the transaction.”¹⁰⁹ Moreover, the Commission exposed the principal clue concerning this transaction, which *prima facie* seems to be a killer acquisition due to the fact that turnover of the startup does not reflect the transaction value, saying that:

(...) GRAIL's competitive significance is not reflected in its turnover, as notably evidenced by the USD 7.1 billion dollar deal value. Genomic cancer tests, having the potential to identify a wide variety of cancers in asymptomatic patients, are expected to be game-changers in the fight against cancer. It is therefore important

¹⁰⁵ www.whitecase.com.

¹⁰⁶ Ibid.

¹⁰⁷ Translation from the original French text. See Conseil d'État, *Illumina-Grail v. Autorité de la concurrence*, order n° 450878 and 450881 of April 1, 2021, paragraphs 4 and 5.

¹⁰⁸ See note 102.

¹⁰⁹ Commission Press Release “Commission to assess proposed acquisition of GRAIL by Illumina,” April 20, 2021.

to ensure that patients get access to this technology as quickly as possible, from as wide sources as possible, and at a fair price.¹¹⁰

On April 29, Illumina sued the Commission before the European court of justice (CJEU) asking the annulment of the Commission's decision asserting jurisdiction to review the Grail acquisition by Illumina.¹¹¹ This case (T-227/21) has not yet information available on the CJEU's website. According to the Illumina lawyers, this company decision was motivated principally because the target company, Grail, has no presence or turnover in Europe and therefore, it does not fall within the merger regulation.¹¹² Now, the company is prevented from finalising the transaction until a decision of the CJEU.

Even though some lawyers claim that such a new application of article 22 EUMR creates legal uncertainty for mergers, the fact is that regarding this above mentioned case, Illumina is the only supplier of the DNA sequencing technology needed by Grail in order to develop its blood test, which is able to detect many types of cancer in early stage.¹¹³ The risk of a potential lack of access to this technology for Grail competitors exists and it would prevent the development of such blood test by other companies.¹¹⁴ The impact of this transaction on society justifies the Commission review because of the huge public interest that is affected as consequence of this acquisition.

5.4. The improvement on capital markets in the EU and its impact on killer acquisitions

A remaining question is whether the European Union could do something else beyond the competition policy in order to help the non-occurrence of killer acquisitions impacting the EU. As it was already exposed, the fact that startups are financed by private venture capital generally leads to an exit strategy of selling the companies to Big Techs. Although both parties are satisfied with this result, in

¹¹⁰ Ibid.

¹¹¹ www.illumina.com.

¹¹² www.ft.com.

¹¹³ www.reuters.com.

¹¹⁴ Ibid.

terms of competition policy and public policies it has a damaging impact on fostering competition and as a consequence a negative result for consumers. That is why public policies aimed at facilitating the funding of small business, specially startups, as well as smoothing the conditions for an initial public offering are crucial for weakening this vicious cycle of selling to Big Techs as the exit strategy.

An answer for the above question is the Capital Market Union (CMU) 2020 action plan. It was implemented on 24 September 2020 and aimed, among other things, “to integrate national capital markets into a genuine single market and to help Europe deliver its Digital Agenda”.¹¹⁵ In reality, the first CMU was adopted in 2015 and since then, it was refined along the years through a series of legislative measures. One of these measures concerns the support to small and medium size (SME) companies. In a document entitled “An SME Strategy for a sustainable and digital Europe”, the Commission details many issues faced by those companies, including startups, and it provides solutions. For instance, the lack of skilled employees was mentioned among those problems faced by SME and startups. For solving this, the Commission will launch a program, which allows young skilled people and experienced seniors to share their digital competence with traditional businesses.¹¹⁶ Another challenge for those SME companies is the limitation of possibilities for financing growth, such as listing on capital markets through an Initial Public Offering (IPO). The proposed solution for that was the creation of a public fund, the SME IPO fund, which “would support SMEs through and beyond the listing process. It will build on the analysis of the EU IPO market and testing with investors and stakeholders.”¹¹⁷ Parallel to that, the Commission together with the European Investment Fund (EIF) launched in 2017 “a Pan-European Venture Capital Funds-of-Funds programme

¹¹⁵ www.ec.europa.eu. What is the capital market union?

¹¹⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. An SME Strategy for a sustainable and digital Europe, p.5.

¹¹⁷ Ibid, p. 15.

(VentureEU) to boost investment in innovative start-up and scale-up companies across Europe.”¹¹⁸

Additionally, in October last year a regulation was adopted on European crowdfunding service providers for business. Crowdfunding is an alternative form for financing startups and SMEs companies.¹¹⁹ It represents an “important type of intermediation where a crowdfunding service provider, without taking on own risk, operates a digital platform open to the public in order to match or facilitate the matching of prospective investors or lenders with businesses that seek funding.”¹²⁰ The differences among the national legislation for crowdfunding “creates substantial legal costs for retail investors who often face difficulties in determining the rules applicable to cross-border crowdfunding services. Therefore, such investors are often discouraged from investing cross-border by means of crowdfunding platforms.”¹²¹ The aim of this regulation is to diminish these legal costs for investors by making the crowdfunding services more uniform in the EU.¹²²

It follows from the measures listed above, that the Commission has been acting not only in the competition policy, but also regarding the capital markets to address specific issues aiming to improve the whole financial system in Europe. The impact of such actions for sure have been and still are crucial for fostering innovation in the old continent. As exposed earlier in this study, the form of a startup fundraising has a huge influence for selling the company as an exit strategy, thus facilitating the killer acquisitions. The median time to IPO for technology firms has increased about six years from the ninety’s until recently¹²³, it became a less attractive way for building the assets. On the other hand, it is

¹¹⁸ eu.europe.eu. VentureEU: €2.1 billion to boost venture capital investment in Europe's innovative start-ups.

¹¹⁹ Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020 on European crowdfunding service providers for business, p.1.

¹²⁰ Ibid.

¹²¹ Ibid, paragraph 6.

¹²² Ibid, paragraph 8.

¹²³ See note 10, p.28.

uncertain that the prevalence of IPO for startups could break the sell strategy. Therefore, it remains unclear if such Commission measures will contribute to diminishing the number of killer acquisitions in the technological sector. It would be necessary to perform an empirical study focused on identifying the main reasons for the occurrence of the killer acquisitions.

5.5. Summary and concluding remarks

In this chapter it was shown the reason why the Dutch clause was adopted in the regulation n°139/2004 and how its application was before the announced modification by the Commission. Moreover, the new application of article 22 EUMR was detailed. The two conditions established under this article for a Member State to refer a concentration which does not have a Community dimension are that this concentration affects trade between member States and it threatens to significantly affect competition within the territory of the Member State making the request. According to the newly adopted approach, a Member State can refer a concentration to the Commission, even though the transaction does not meet the national threshold, because the two previously mentioned conditions are met. The Commission explained that its goal with the new application of article 22 EUMR is to control transactions involving targets whose turnover does not reflect its actual or future competitive potential. Therefore, the Commission adopted as an acquisition assessment criterion, the value received by the seller and verify if it is much higher than its turnover. Additionally, among the modifications of the application of article 22 EUMR, it is worth mentioning the introduction of the posterior concentration control. A Member State can refer a concentration until six months after its execution.

This chapter also explored the first concentration referral under the new application of the article 22 EUMR (case Illumina/Grail), exposing the current situation and commenting the decision of the Commission. It is significant to underline that the new approach of application of article 22 EUMR seems to be the most adequate Commission's decision because it was the quicker measure than the adoption of a new threshold, as Germany and Austria have done. In order

to find an ideal transaction value threshold, it would be necessary to invest much time for finding a value able to catch the killer acquisitions without covering several insignificant acquisitions. Furthermore, the fact that the Member States need to pay attention to transactions which do not achieve their national thresholds now, possibly increasing their costs, is perfectly justifiable in reason of the public interest, which is affected by the killer acquisitions. Finally, it was shown that the Commission took measures outside of the competition policy, which also suggests to have an impact on preventing such anticompetitive acquisitions. But, based on this investigation it is not possible to demonstrate the real effects of such measures on the killer acquisitions.

6. Conclusion

The phenomena of the huge quantity of startups acquisitions performed by Big Techs, specially by GAFAM, has brought the attention of the competition authorities globally. These transactions have been called killer acquisitions and were firstly studied in the pharmaceutical sector. In the technological sector, the dominant platforms represent a big challenge for small companies to compete, once the digital market is featured, among other things, by the demand-driven network effect. That means the greater the number of users, the greater is the value of the platform. In addition, it was demonstrated that the US antitrust law lag leads to the situation of legal impossibility to restrain harmful conducts of those companies, allowing their exponential growth at the expense of the consumers, the market and the small companies. As a consequence, the strengthening of their dominant position allowed them to cross US borders and to bring their anticompetitive practices to the whole world.

In Europe, killer acquisitions are done without passing the control of the Commission due to their turnover being lower than those established by European merger regulation, causing thus an intense debate about the need of regulation change. Those transactions do not reflect the actual or future competitive potential of the startups acquired and therefore, in a first moment it was thought to change the turnover based threshold to a transaction value based in order to catch the killer acquisitions. Germany and Austria have implemented an additional transaction value based threshold. The Commission, however, has chosen to give a new application of the article 22 of the EUMR.

Since its implementation and along its evolvement, the EUMR has undergone profound transformations. One of the most essential was the adoption of the Significant Impediment to Effective Competition (SIEC) test. Together with the adoption of the German and the Dutch clauses the EUMR is the framework which

allows the Commission to control mergers having as an assessment the companies' turnover. Before September 2020, the use of the Dutch clause was not encouraged by the Commission for transactions which do not exceed the national threshold. Since then, nevertheless, the Commission encourages it and calls the Member States to act vigorously for referring possible killer acquisitions. In the Guidance on the application of the referral mechanisms set out in article 22 of the EUMR, it was detailed, among other things, that the Commission can take into account the value of the undertaking's turnover and compare it with the transaction value, for assessing the possible existence of a killer acquisition. Moreover, the introduction of the posterior merger control was a controversial innovation adopted in the new application of article 22 EUMR.

The Illumina/Grail concentration case is the first one referred based on this new application of the Dutch clause and it is still pending judgement in the European Court of Justice. Illumina, a multinational company based in US and Grail, a startup also based in US, announced in September 2020 their intention of merger. Grail does not possess offices in Europe, neither has it products on the market yet. The Commission has, however, invited some Member States to refer such transaction based on the article 22 EUMR. The referral was thus made by the French Competition Authority and followed by the Belgium, Greece, the Netherlands, Iceland and Norway. The particularity of this case is that under the national law of any Member State the mentioned transaction reaches a notifiable threshold. Therefore, Illumina sued the Commission before the CJEU having this fact, among others, as an argument against the Commission's decision.

In conclusion, it was shown that actions outside of the competition policy can have an impact on preventing the occurrence of the killer acquisitions. The Capital Market Union (CMU) was one of these actions and has included a plan to support SME companies through different actions. For instance, the creation of a public fund for incentive such companies through and beyond their listing process. Some scholars argue that because startups are in their majority funded by capital venture, selling such companies to Big Techs is the most natural exit

strategy. They argue that the IPO fund could lead to less use of this strategy and consequently, it could lower the killer acquisitions. However, from the present research it is not possible to conclude that the measures adopted regarding the CMU are able to prevent killer acquisitions. It would require an economic analysis as this extrapolates the legal boundaries of this investigation.

Reference list / Bibliography

Official Publications

European Union

Commission. Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18.10.2008, p. 6–25

Commission. Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, C(2021) 1959 final, p.1-8 <https://ec.europa.eu/competition/consultations/2021_merger_control/guidance_article_22_referrals.pdf> accessed April 30, 2021

Commissioner Vestager, “The future of EU Merger Control,” International Bar Association 24th Annual Competition Conference, September 11, 2020

Council Regulation 4064/89 of 21 December 1989, on the control of concentrations between undertakings, 1990 OJ L257/13

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. An SME Strategy for a sustainable and digital Europe. An SME Strategy for a sustainable and digital Europe. COM(2020) 103 final

Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004, p. 1–22. Available at <<http://data.europa.eu/eli/reg/2004/139/oj>> accessed April 10, 2021

Consolidated version of the Treaty on the Functioning of the European Union, OJ C 202, 7.6.2016, p. 89–90

Consolidated text: Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast). Available at <<http://data.europa.eu/eli/dir/2014/65/2016-07-0>> accessed April 10, 2021

Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU Text with EEA relevance. OJ L 173, 12.6.2014, p. 349–496

Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020 on European crowdfunding service providers for business, and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937

Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020 on European crowdfunding service providers for business, and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937. OJ L 347, 20.10.2020, p. 1–49

National Law

Austrian Cartel and Competition Law Amendment Act 2017 (Kartell- und Wettbewerbsrechts-Änderungsgesetz 2017) <https://www.parlament.gv.at/PAKT/VHG/XXV/I/I_01522/index.shtml#tab-Uebersicht> accessed April 2, 2021

Bundswettbewerbsbehörde (201) ‘Digitisation, Transaction Value Thresholds in Merger Control and Associated Challenges’ <http://ec.europa.eu/competition/information/digitisation_2018/contributions/austrian_competition_authority.pdf> accessed April 2, 2021

Literature

Books

Coase Ronald, *The Firm, the Market, and the Law*. (University of Chicago Press, 1990)

DePamphilis Donald, *Mergers, Acquisitions, and Other Restructuring Activities: An Integrated Approach to Process, Tools, Cases, and Solutions* (Academic Press, 10th Edition 2019)

Hoecke Mark Van, ed. *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline?*. London: Hart Publishing, 2011

Kokkoris Ioannis and Shelanski Howard, *EU merger control- A legal and economic analysis* (Oxford University Press 2014)

Martenet Vincent and Heinemann Andreas, *Droit de la concurrence*. Chappuis Christine et al. (édit.) Collection Quid Iuris, Genève/Zurich/Bâle, Bruxelles, Paris. (Schulthess, L.G.D.J., Bruylant, 2012)

McConville Mike and Wing Hong Chui, eds. *Research Methods for Law*. Edinburgh: Edinburgh University Press, 2017.

van Boom, Willem H., Pieter Desmet, and Peter Mascini, eds. *Empirical Legal Research in Action*, (Cheltenham, UK: Edward Elgar Publishing, 2018)

Wish Richard and Bailey David, *Competition Law* (Oxford Univ. Press 9th ed. 2018)

Wu Tim, *The Curse of Bigness: antitrust in the new gilded age* (Colombia Global Rep. 2018)

Articles

Aridi Anwar and Petrovčič Urška, 'Big Tech, Small Tech, and the Data Economy : What Role for EU Competition Law?' (2019) Washington D.C. World Bank Group <<https://openknowledge.worldbank.org/handle/10986/33124>> accessed April 8, 2021

Bartlett Robert P, 'A founders' guide to unicorn creation: how liquidation preferences in M & A transactions affect start-up valuation', in *Research Handbook on Mergers and Acquisitions*, (Cheltenham, UK: Edward Elgar Publishing, 2016) <<https://doi-org.ludwig.lub.lu.se/10.4337/9781784711481.00016>> accessed April 5, 2021

Byars Kaleb, ‘An 'Essential' Solution: Reworking the Essential Facilities Doctrine to Address Big Tech’s Harm to the Marketplace of Ideas’ (2021) *Mississippi Law Journal*, Forthcoming <<https://ssrn.com/abstract=3804510>> accessed April 2, 2021

Chirita Anca D, ‘Data-Driven Mergers Under EU Competition Law’ (June 20, 2018), in *The Future of Commercial Law: Ways Forward for Harmonisation* (eds) J Linarelli & O Akseli (1st ed, Oxford, Hart Publishing, 2019), 147-183 <<https://ssrn.com/abstract=3199912>> accessed April 4, 2021

Coates John C. ‘M & A contracts: purposes, types, regulation, and patterns of practice’. In *Research Handbook on Mergers and Acquisitions*, (Cheltenham, UK: Edward Elgar Publishing, 2016) <<https://doi-org.ludwig.lub.lu.se/10.4337/9781784711481.00010>> accessed April 12, 2021

Crémer Jacques, Montjoye Yves-Alexandre and Schweitzer Heike, ‘Competition policy for the Digital Era’ (2019) <<https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>> accessed April 2, 2021

Holmström Mats, Padilla Jorge, Stitzing Robin and Sääskilahti Pekka, ‘Killer Acquisitions? The Debate on Merger Control for Digital Markets’ (2018) *Yearbook of the Finnish Competition Law Association* <<https://ssrn.com/abstract=3465454>> accessed March 31, 2021

Cunningham Colleen, Ederer Florian and Ma Song, ‘Killer Acquisitions’ (April 19, 2020) *Journal of Political Economy* Vol. 129, No. 3, pp. 649–702 <<https://ssrn.com/abstract=3241707>> accessed March 31, 2021

Duso Tomaso, Gugler Klaus Peter and Szücs Florian, ‘An Empirical Assessment of the 2004 EU Merger Policy Reform’ (July 2013) WZB Discussion Paper SP II 2010-16 <<https://ssrn.com/abstract=1721412>> accessed April 2, 2021

Eliasz Toni, Wyne Jamil and Lenoble Sarah, ‘The Evolution and State of Singapore’s Start-up Ecosystem: Lessons for Emerging Market

Economies' (2021) World Bank, Washington, DC World Bank <<https://openknowledge.worldbank.org/handle/10986/35328>> accessed April 2, 2021

Fox Eleanor M and First Harry, 'We Need Rules to Rein in Big Tech' (2020) CPI Antitrust Chronicle October 2020, NYU Law and Economics Research Paper No. 20-46 <<https://ssrn.com/abstract=3724595>> accessed April 2, 2021

Gautier Axel and Lamesch Joe, 'Mergers in the Digital Economy' (2020) CESifo Working Paper No. 8056 <<https://ssrn.com/abstract=3529012>> accessed April 4, 2021

Glick Mark A, Ruetschlin Catherine and Bush Darren, 'Big Tech's Buying Spree and the Failed Ideology of Competition Law: The Example of Facebook' (December 11, 2020) Hastings Law Journal, Forthcoming, U of Houston Law Center No. 2020-A-42 <<https://ssrn.com/abstract=3746728>> accessed April 10, 2021

Hoffmann Jörg and Johannsen Germán Oscar, 'EU-Merger Control & Big Data On Data-specific Theories of Harm and Remedies' (May 31, 2019) Forthcoming, Marco Botta, Josef Drexl (eds.), EU Competition Law Remedies in Data Economy, Springer 2019, Max Planck Institute for Innovation & Competition Research Paper No. 19-05 <<https://ssrn.com/abstract=3364792>> accessed April 10, 2021

Jullien Bruno and Sand-Zantman Wilfried, 'The Economics of Platforms: A Theory Guide for Competition Policy' (September 24, 2019) TSE Digital Center Policy Papers series, No.1, 2019. <<https://ssrn.com/abstract=3502964>> accessed April 10, 2021

Katz Michael L, 'Big-Tech Mergers: Innovation, Competition for the Market and the Acquisition of Emerging Competitors' (July 21, 2020) <<https://ssrn.com/abstract=3624380>> accessed April 10, 2021

Lemley Mark A and McCreary Andrew, 'Exit Strategy' (December 19, 2019) Stanford Law and Economics Online Working Paper #542 <<https://ssrn.com/abstract=3506919>> accessed April 10, 2021

Levy Nicolas, 'EU Merger Control: from birth to adolescence' *Kluwer Law International*, 26(2): 195-218, 2003

Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710, 792-97 (2017)

Moss Diana L, 'The Record of Weak U.S. Merger Enforcement in Big Tech (July 8, 2019) <<https://ssrn.com/abstract=3417978>> accessed April 10, 2021

Motta Massimo and Peitz Martin, 'Big Techs Merges' CRC TR 224 Discussion Paper Series, 2020. University of Bonn and University of Mannheim, Germany <https://ideas.repec.org/p/bon/boncrc/crcr224_2020_147v1.html> accessed April 10, 2021

OECD, 'Start-ups, Killer Acquisitions and Merger Control' (2020) <<https://www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control-2020.pdf>> accessed March 31, 2021

Parker Geoffrey, Petropoulos Georgios and Alstyne Marshall Van, 'Platform mergers and antitrust' Working Paper (01/2021), Bruegel

Röller Lars-Hendrik and Da La Mano Miguel, 'The impact of the new substantive test in European merger control' (2006) *European Competition Journal* pp. 9-28

Rubinfeld Daniel L, 'Antitrust Policy: Lessons from the US' *International Encyclopedia of the Social & Behavioral Sciences* (Second Edition), Elsevier, 2015

Sawyer Laura Phillips, 'US Antitrust Law and Policy in Historical Perspective' (May 2019) Harvard Business School Working Paper #19-110

Selznick Philip, Law in Context Revised, *Journal of Law and Society*, Vol. 30, No. 2 (Jun., 2003), pp. 177-186 <<https://www.jstor.org/stable/1410767>> accessed May 20, 2021

Timothy J Brennan, Vertical Mergers, The Coase Theorem, And The Burden of Proof, *Journal of Competition Law & Economics*, Volume 16, Issue 4, December 2020, Pages 488–510

Yun John M, ‘Potential Competition, nascent competitors and killer acquisitions’ (November 11, 2020). The Global Antitrust Institute Report on the Digital Economy 18 <<https://ssrn.com/abstract=3733716>> accessed April 10, 2021

UNCTAD. Competition issues in the digital economy. TD/B/C.I/CLP/54 <https://unctad.org/system/files/official-document/ciclpd54_en.pdf> accessed April 10, 2021

UNCTAD. Digital Economy Report, 2019 <<https://unctad.org/webflyer/digital-economy-report-2019>> accessed April 10, 2021

Online sources

Betsy Lordan, ‘FTC Challenges Illumina’s Proposed Acquisition of Cancer Detection Test Maker Grail’ *Federal Trade Commission* <<https://www.ftc.gov/news-events/press-releases/2021/03/ftc-challenges-illumina-proposed-acquisition-cancer-detection>> accessed April 25, 2021

European Startup Monitor 2019/2020 <http://www.europeanstartupmonitor2019.eu/EuropeanStartupMonitor2019_2020_21_02_2020-1.pdf> accessed April 10, 2021

Javier Espinoza and Hannah Kuchler, ‘Illumina sues Brussels over probe into \$8bn cancer deal for Grail’ *Financial Times* <<https://www.ft.com/content/6913dc65-6bb3-4584-b76e-93e84e732311>> accessed April 25, 2021

Jérémie Masthan, Mark Powell, Tilam Kuhn and Rahel Wendebourg, ‘Latest developments on the Article 22 EUMR referral mechanism: the only thing that's certain is the uncertainty’ *White and Case LLP* <<https://www.whitecase.com/publications/alert/latest-developments-article-22-eumr-referral-mechanism-only-thing-thats-certain>> accessed April 25, 2021

Nabila Ahmed and Ed Hammond, 'Illumina Said Close to Buying Bezos-Backed Cancer Firm Grail' *Bloomberg* <<https://www.bnnbloomberg.ca/illumina-nears-deal-to-buy-health-care-startup-grail-1.1494898>> accessed April 10, 2021

Rikki Haria, Carmen Vigós, Sharon Malhi, James Aitken and Thomas Wessely, 'The European Commission publishes guidance on its broadened Member State referral system – but unpredictability and uncertainty remains' *Freshfields Bruckhaus Deringer* <<https://transactions.freshfields.com/post/102guir/the-european-commission-publishes-guidance-on-its-broadened-member-state-referral>> accessed April 25, 2021

Reuters. Illumina CEO says GRAIL deal is good for competition <<https://www.reuters.com/article/us-grail-m-a-illumina-idUSKBN2BV2TV>> accessed April 25, 2021

Tobias Caspary, Neda Moussavi and Annalie Grogan, 'Reinvention of the Dutch Clause: The European Commission Takes Merger Control Jurisdiction Over Non-Reportable Deals' (2021) Antitrust and Competition Law Alert n° 21/04/16 *Fried, Frank, Harris, Shriver & Jacobson LLP* <<https://www.friedfrank.com/siteFiles/Publications/FFANTITRUSTECExpandsMerger04152021.pdf>> accessed April 25, 2021