KILLER ACQUISITIONS IN THE DIGITAL SECTOR: A FRAMEWORK TO PRESERVE INNOVATION COMPETITION

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Key words: Killer Acquisitions, Nascent Competitor, Innovation Competition, Digital.

I. INTRODUCTION

Killer acquisitions have come under the eye of the entire antitrust community. The topic has been very much in vogue at conferences[2] and in the wide range of expert panel reports on competition law and digitization produced by antitrust authorities and academic institutions around the world.[3] But this issue has not always been approached in a systematic way and there is still no emerging consensus.[4] This paper thus sets out a general framework to evaluate killer acquisitions by tying together the various strands in the existing literature, as well as recent developments. Section II makes some conceptual clarifications. Section III outlines possible *ex ante* and *ex post* control mechanisms for capturing and deterring killer acquisitions. Section IV advocates for a set of criteria for their substantive analysis.

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[2] See, for instance, OECD Competition Open Day 2020 (Paris - February 26, 2020); 7th Global Merger Control Conference (Paris – December 6, 2019); Innovation Economics For Antitrust Lawyers (London – March 1, 2019); 10th Annual NYC Concurrences Private Dinner. Startups v. Big Tech: Where Is the Innovation? (New York – September 12, 2019); EU Commission Conference: "Shaping competition policy in the era of digitization" (Brussels - January 17, 2019).

[3] J. CRÉMER, Y. DE MONTOJYE & H. SCHWEITZER, "Competition policy for the digital era," April 2019 ("EC Report"); J. FURMAN et al., "Unlocking digital competition. Report of the Digital Competition Expert Panel," March 2019 ("Furman Report"); Chicago Booth George J. Stigler Center, Report from the Committee for the Study of Digital Platforms, May 2019 ("Stigler Report"); Australian Competition & Consumer Commission's Report, Digital Platforms Inquiry, July 2019 ("ACCC Report"); and Report by the German Commission 'Competition Law 4.0,' "A new competition framework for the digital economy," September 2019 among others. For an overview of these reports, see "Global Digital Reports" *Competition Policy International,* Antitrust Chronicle, Volume 3(2), December 2019.

[4] J. MANCINI, "Digital antitrust: An emerging consensus?," *Concurrences,* Nº 4-2019, pp. 1-8.

II. PRELIMINARY CONCEPTUAL CLARIFICATIONS

The term "*killer acquisition*" has taken on different meanings depending on where it has been discussed. In order to properly frame the scope of the debate, some conceptual clarifications are needed.

A. "Killer", "Zombie", "Suicide" and "Reverse Acquisitions"

The "star" article that served to propel this debate, "*Killer Acquisitions*," defined the term as acquisitions of nascent competitors by incumbent firms with the sole purpose "to discontinue the target's innovation projects and pre-empt future competition."[5] Similarly, the European Commission defined killer acquisitions as transactions where "an incumbent acquires a potential competitor with an innovative project that is still at an early stage of its development and subsequently terminates the development of the target's innovation in order to avoid a replacement effect".[6] Killer acquisitions were therefore initially understood in a narrow sense, only including those transactions after which the target project would be shut down. In this regard, it should be noted that the estimate in Cunningham *et al –i.e.*, that around 6 percent of all acquisitions in the pharmaceutical sector were killer acquisitions– was accordingly limited to this specific type of acquisition. Gradually, however, the concept of killer acquisitions started to be used in a much broader sense. Subsequent antitrust conferences and academic contributions employed the term in a general way to include all acquisitions by incumbent firms with the objective of neutralizing a nascent competitor, regardless of whether the target company and its innovative project were terminated post-transaction.

In this paper, the broader concept will be used. Therefore, acquisitions that result in the target project not being developed to its full potential, as opposed to plain termination, will be included under the banner of killer acquisitions. So-called *"*zombie acquisitions*"*[7] are detrimental to innovation because they similarly result in the loss of a potential competitor and its innovative

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[5] C. CUNNINGHAM, F. EDERER and S. MA, "Killer Acquisitions," available at SSRN, March 22, 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3241707.

[6] EC Report, p. 117.

[7] See L. CAMPOS' contribution at the 7th Global Merger Control Conference (Paris – December 6, 2019).

pipeline or developing projects. Further, acquisitions of superior projects to ones held by the acquirer, which may result in the discontinuation of its own, will also be included. "*Suicide*"[8] or "*reverse acquisitions*"[9] harm innovation by removing a potential competitor and preventing the development of new projects by the acquirer to counter the threat. In sum, this paper will use the term killer acquisitions in the broad sense to refer to all such potentially anti-innovative transactions, including "zombie", "suicide", "reverse" and other similarly-motivated acquisitions.

B. Killer Acquisitions v. Pro-innovative "Bolt-on Acquisitions"

Despite what one might suspect, the vast majority of acquisitions by digital incumbents do not have the objective of *killing* potential competitors, but foster innovation in at least two ways.

i. Promoting innovative efforts *ex ante*

As the EC Report highlighted, "the chance for start-ups to be acquired by larger companies is an important element of venture capital markets: it is among the main exit routes for investors and it provides an incentive for the private financing of high-risk innovation."[10] "Entry for buyout", as it is described in the economics and management literature, is in many cases the only reason entrepreneurs are willing to undertake certain projects. Even if the latter may result in valuable and innovative products in the long run, they frequently yield from zero to negative returns in the early stages of development. Entrepreneurs are thus only willing to take on these projects and forgo early profits with the expectation of one day being acquired by a large company.

In addition, start-ups often rely on the financial, reputational, and organizational infrastructure of the established acquirer to successfully innovate and effectively deploy their products.

ii. Integrating complementary products and capabilities *ex post*

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[8] See S. ALBACK's contribution at the 7th Global Merger Control Conference (Paris – December 6, 2019).

[9] C. CAFFARRA, G. S. CRAWFORD and T. VALLETTI, "How Tech Rolls: Potential Competition and Reverse Killer Acquisitions", *Competition Policy International,* Antitrust Chronicle, May 2020.

[10] EC Report, p. 111. See, in the same vein, Furman Report, pp. 49-50.

When an acquirer purchases a complementary technology, the merger will generally increase the innovation performance of the resulting undertaking and thus benefit consumers,[11] so long as it is carefully integrated.[12] With that purpose in mind, companies often "bolt-on" the newly acquired complementary technologies and capabilities to their current offerings in order to enhance their value proposition. "Bolt-on acquisitions*"* are pervasive among big tech firms. For instance, Google acquired and integrated myriad complementary technologies and capabilities to its Google Maps product, ranging from traffic and map analysis to location-based analytics and local recommendations/reviews apps –like ZipDash, Where2, Keyhole Inc, Endoxon, ImageAmerica, Quiksee, Zagat, Clever Sense, Skybox Imaging, Urban Engines, etc.,– which have allowed it to substantially improve its original product to the benefit of consumers. Among these, only *Google/Waze* raised concerns, but the UK national competition authority ("NCA") reviewed the transaction and ruled out any significant impediment to competition.[13]

Recent empirical research into M&A activity in the digital sector supports this claim. For instance, in "*Mergers in the Digital Economy*," Gautier & Lamesch concluded that, out of the 175 acquisitions by Google, Amazon, Facebook, Apple and Microsoft ("GAFAM") between 2015 and 2017, only one could potentially be characterized as a killer acquisition.[14] As they showed, even if more than 60 percent of projects acquired by the GAFAM companies are shut down post-transaction, the underlying assets and capabilities (mainly functionality, technology, human capital or IP) are subsequently integrated into their ecosystem, acting as a substitute for in-house R&D. These considerations should be taken into account when discussing killer acquisitions, for instance, before contemplating proposals to reverse or lighten the burden of proof.[15]

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[11] B. CASSIMAN et al., "The Impact of M&A on the R&D Process: An Empirical Analysis of the Role of Technological and Market Relatedness," (2005) 34, *Research Policy*, p. 197. Other contributions in the same sense include Gans & Stern (2003), Arora & Gambardella (2010), Arora et al. (2014).

[12] "The Problem of Bolt-On Acquisitions in a Digital World," *Harvard Business Review*, July 5, 2016.

[13] *Google/Waze* (Case ME/6167/13), Office of Fair Trading decision of November 11, 2013. The OFT ruled out any potential competition concerns in the relevant market of provision of navigation applications for mobile devices (paras. 83 et seq.).

[14] A. GAUTIER & J. LAMESCH, "Mergers in the Digital Economy," at SSRN, January 17, 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3529012.

[15] See below section IV.B.i.

Notwithstanding the above, acquisitions by incumbent firms of nascent competitors merit review by competition authorities. This is because nascent competitors have the potential to disrupt existing competitive paradigms and bring about significant benefits for consumers.

III. *EX ANTE* AND *EX POST* CONTROL MECHANISMS TO CATCH AND DETER KILLER ACQUISITIONS

A. *The Elusive Nature of Killer Acquisitions*

The first and most important impediment to the assessment of acquisitions of nascent competitors by incumbent digital firms is that they often escape the notification requirements of the EU Merger Regulation ("EUMR"). In this sense, the Furman Report noted that GAFAM companies have engaged in close to 250 acquisitions globally in the period between 2014 and 2019, without any of them being prohibited.[16] Others have reported similar numbers.[17] This is explained by the fact that, to determine whether a transaction is notifiable, thresholds usually take into consideration not only the combined aggregate turnover of the merging parties, but also their individual aggregate turnover.[18] In contrast, "start-ups [usually] attempt [first] to build a successful product and attract a large user-base without much regard for short term profits: they hope either to be acquired or to begin monetizing their user base at a relatively late stage."[19]

Because of this lack of scrutiny, little was known about the acquisitions of digital incumbents. However, more information has come to light as competition authorities conducted empirical studies, making use of their sector enquiry and request-for-information tools. In this sense, the US Federal Trade Commission's ("FTC") announced on February 11, 2020, that it would

[16] Furman Report, p. 91.

[17] "Did Big Tech Get Too Big?," Bloomberg, March 21, 2019: 431 acquisitions in the last decade; A. GAUTIER and J. LAMESCH, *supra* note 14: 175 acquisitions between 2015 and 2017.

[18] EUMR, Articles 1(2) and (3).

[19] EC Report, p. 116.

investigate past acquisitions of the incumbent digital firms.[20] The FTC thus ordered the GAFAM companies to provide vast amounts of information on the terms, scope, structure and purpose of all their non-reported acquisitions between January 1, 2010 and December 31, 2019.[21] Likewise, the European Commission published on March 26, 2021, the results of its evaluation on jurisdictional and procedural aspects of EU merger control, which sheds light on transactional activity in the EU, particularly in the digital and pharmaceutical sectors.[22] The evaluation reviewed, for the relevant period between 2015 and 2019, a wide body of evidence, including (i) over 3,500 transactions from Bloomberg's financial database, (ii) the Commission's own enforcement practice, (iii) the transactional activity of the GAFAM companies and (iv) economic literature.[23] According to the Commission, these sources showed that there was indeed an enforcement gap in EU merger control, given that a number of competitively relevant transactions had not been caught by the EUMR thresholds, which could have merited investigation.[24]

B. *Ex-Ante Control Mechanisms*

i. Referrals from NCAs to the Commission

Until now, some of the relevant transactions that escaped the EUMR thresholds were caught through the referral mechanisms of the EUMR. The latter are, in essence, a system which allows for transactions that would normally have to be assessed by NCAs to be transferred to the Commission and *vice versa*. The relevant provisions of the EUMR are summarized in Table 1.

Table 1

[20] FTC to Examine Past Acquisitions by Large Technology Companies, February 11, 2020. To the author's best knowledge, the results of the investigation have not been published yet.

[21] *Idem.*

[22] Commission Press Release IP/21/1384, "Mergers: Commission announces evaluation results and follow-up measures on jurisdictional and procedural aspects of EU merger control," March 26, 2021; and Commission Staff Working Document ("SWD"), Evaluation of procedural and jurisdictional aspects of EU merger control, SWD(2021) 66 final of March 26, 2021.

[23] SWD, para. 99 et seq.

[24] *Ibid*, paras. 113 and 132.

	Pre-notification referral at the request of the undertaking(s)	Post-notification referral at the request of Member State(s)
From the Commission to Member State(s)	Article 4(4) EUMR	Article 9EUMR
From Member State(s) to the Commission	Article 4(5) EUMR	Article 22 EUMR

Source: SWD, p. 19.

For instance, the *Apple/Shazam* merger was referred to the Commission by the Austrian authority and joined by other NCAs pursuant to Article 22 EUMR.[25] Other acquisitions, like *Facebook/WhatsApp*, were referred to the Commission by the notifying parties, in accordance with Article 4(5) EUMR.[26] Table 2 provides a comprehensive list of competitively relevant transactions in the digital sector that were reviewed by the Commission following referrals from NCAs.

Table 2

		Article 4(5)	**Article 22**	**Above EUR 1 bn?**	**Phase II and/or intervention?**
Digital					
1.	M.9424 – Nvidia/Mellanox (2019)	X		Yes	No
2.	M.9005 – Booking Holdings/HotelsCombined (2018)	X		No	No
3.	M.8994 – Microsoft/GitHub (2018)	X		Yes	No
4.	M.8788 – Apple/Shazam (2018)		X	No	Yes
5.	M.8416 – Priceline/Momondo (2017)	X		No	No
6.	M.7802 – Amadeus/Navitaire (2015)		X	No	No
7.	M.7678 – Equinix/Telecity (2015)	X		Yes	Yes
8.	M.7202 – Lenovo/Motorola Mobility (2014)	X		Yes	No
9.	M.7217 – Facebook/WhatsApp (2014)	X		Yes	No
10.	M.6007 – Nokia Siemens/Motorola network business (2010)	X		No	No
11.	M.6095 – Ericsson/Nortel (2011)	X		No	No

[25] Commission Decision of 6 September 2018, *Apple/Shazam*, M.8788.

[26] Commission Decision of 3 October 2014, *Facebook/Whatsapp*, M.7217.

12.	M.5983 – Tyco Electronics/ADC (2010)	X		Yes	No
13.	M.5669 – Cisco/Tandberg (2010)	X		Yes	Yes
14.	M.5732 – HP/3Com (2010)	X		Yes	No
15.	M.4731 – Google/DoubleClick (2008)	X		Yes	Yes
16.	M.5317 – IBM/Ilog (2008)	X		No	No
17.	M.4747 – IBM/Telelogic (2008)	X		No	Yes
18.	M.4854 – TomTom/TeleAtlas (2008)	X		Yes	Yes
19.	M.4942 – Nokia/Navteq (2008)	X		Yes	Yes
20.	M.4910 – Motorola/Vertex (2007)	X		No	No
21.	M.4881 – Dell/Asap (2007)	X		No	No
22.	M.4523 – Travelport/Worldspan (2007)	X		Yes	Yes

Source: Commission SWD, p. 38.

As shown above, 8 out of 22 transactions referred to the Commission in the digital sector were subject to an in-depth investigation or intervention (*i.e.*, 36%). This percentage is significantly higher than the Commission's overall rate at around 8%.[27] Accordingly, the Commission concluded that "the referral mechanisms have been a useful tool to catch relevant transactions falling outside the current turnover thresholds in the [digital sector]",[28] in particular, via Article 22 EUMR.[29] These findings led the Commission to adopt on March 26, 2021, a much-discussed Communication on Article 22 EUMR, aiming to fill the enforcement gap regarding transactions "where the turnover of at least one of the undertakings concerned does not reflect its actual or future competitive potential".[30]

Article 22 EUMR enables NCAs to refer to the Commission transactions that do not meet the EU turnover thresholds, provided they: (i) affect trade between Member States; and (ii) threaten to significantly affect competition within the referring Member State(s).[31] The Commission's long-standing practice has been to discourage referrals if the referring NCA lacked jurisdiction over the

[27] SWD, para. 118.

[28] *Ibid*, paras. 118 and 133.

[29] *Ibid*, para. 146.b.

[30] Communication of 26 March 2021 - 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 (the "Communication"), paras. 10 and 19. See, for instance, "European Commission Implements New Policy To Investigate Transactions That Would Otherwise Escape Merger Review", *Cleary Gottlieb Steen & Hamilton*, Alert Memorandum, April 23, 2021.

[31] The Communication provides further guidance on these two criteria. See paras. 13–15.

transaction,[32] as the Commission found such cases "not generally likely to have a significant impact on the internal market."[33] Through this Communication, the Commission now underlines that it will instead "encourage and accept [such] referrals".[34] Moreover, the Communication highlights that referrals will be possible even where a transaction has been implemented.[35] Though the Commission will "generally not consider" referrals of transactions that were implemented more than six months prior.[36]

According to the Communication, these changes are "[clearly supported by] the wording, the legislative history and the purpose of Article 22 [EUMR], as well as from the Commission´s enforcement practice".[37] But one may doubt whether that is actually the case. As the Communication itself notes, Article 22 EUMR was originally conceived (merely) as a way to fill the enforcement gap in Member States with no merger control regimes (*e.g.*, the Netherlands), where consequently there were neither jurisdictional thresholds nor standstill obligations.[38] And arguably not as a general purpose or catch-all provision. Since then, all Member States but Luxembourg have enacted merger control regimes.[39] It is therefore no surprise why private practice has generally not welcomed the Commission's new approach to Article 22 EUMR, often stressing that it creates significant legal uncertainty.[40]

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[32] Communication, para. 8; Commission Notice on Case Referral in respect of concentrations (2005/C 56/02) of March 5, 2005 ("Notice on Case Referral"), para. 45.

[33] Communication, para. 8.

[34] *Ibid*., para. 11.

[35] *Ibid*, para. 21.

[36] *Idem*.

[37] *Ibid*, paras. 6 and 21.

[38] Communication, footnote 8. This led the provision to be known as the "Dutch clause".

[39] "European Commission Implements New Policy To Investigate Transactions That Would Otherwise Escape Merger Review", *Cleary Gottlieb Steen & Hamilton*, Alert Memorandum, April 23, 2021.

[40] See, for instance, "European Commission Implements New Policy To Investigate Transactions That Would Otherwise Escape Merger Review", *Cleary Gottlieb Steen & Hamilton*, Alert Memorandum, April 23, 2021; "Transforming European Merger Control: The Commission Specifies When It Will Seek To Review Mergers That Are Not Subject To Any Filing Requirements", *Cleary Gottlieb Steen & Hamilton*, European Competition Law Newsletter, March 2021.

Besides, Article 22 EUMR has some important limitations that should be noted. First, the decision to refer a transaction remains at all times with the NCAs.[41] And second, the Commission is only able to look at the implications of the merger in the territories of the referring NCAs.[42] This is different under Article 4(5) EUMR, where the Commission acquires full jurisdiction over the transaction, but it still needs to be notified by the merging parties, and this may not always be in their own interest. Because of these factors, the referral system has proven to be insufficient and some controversial transactions never reached the Commission's hands, including *Facebook/Instagram* and *Google/Waze*. Both transactions were instead caught by the UK merger framework and assessed by the then Office of Fair Trading.[43] The Commission may thus have to complement the EUMR referral provisions with other mechanisms –some of which will discussed *infra*.

Lastly, it should be noted that the Commission has actually started to implement the Communication more than a month before its publication. On February 19, 2021, the Commission invited NCAs to refer the *Illumina/Grail* transaction, which did not meet any national notification thresholds.[44] The French and Dutch NCAs decided to refer the transaction and were subsequently joined by the Belgian, Greek, Dutch, Icelandic and Norwegian NCAs.[45] The Commission accepted the referral and announced that it will assess the transaction.[46] More recently, the Austrian NCA referred to the Commission Facebook's acquisition of Kustomer, which was notifiable under the national merger control regime.[47]

ii. Transaction value-based thresholds

[41] Communication, para. 26.

[42] EUMR Article 22(3), first paragraph: Notice on Case Referral, para. 50.

[43] Since 2014, the OFT has been replaced by the Competition and Markets Authority ("CMA").

[44] Commission to assess proposed acquisition of GRAIL by Illumina, Commission, Press release MEX/21/1846 of April 20, 2021. Illumina, a U.S.-based pharmaceutical company announced on September 21, 2020, its intention to acquire Grail, a U.S. start-up that developed multi-cancer early detection tests.

[45] *Idem*..

[46] *Idem. Illumina/Grail*, Case No. M.10188. The Decision to accept the referral has not been published as of this writing.

[47] "Facebook purchase of Kustomer may face EU antitrust scrutiny", Reuters, April 6, 2021. See also "Kustomer To Join Facebook, Helping Brands Thrive In The Digital Economy with Modern Customer Service", available at: https://www.kustomer.com/blog/kustomer-to-join-facebook-helping-brands-thrive-in-digital-economy/.

In order to fill the enforcement gap concerning killer acquisitions, and following Austria and Germany's lead, many called for a reform of the EUMR to adopt transaction value-based thresholds.[48] Nevertheless, this proposal shows several potential weaknesses, as highlighted by the EC Report.[49] First, transaction values of companies are complicated and there are different methodologies for measuring them. In addition, transaction values may quickly change in response to events that are unrelated to the underlying assets. All of this could create legal uncertainty as to when companies should notify.[50] Second, the extension of the jurisdiction could entail an increase in administrative burden for the Commission, as well as additional transaction costs for merging parties.[51] Third, the exercise of designing and calibrating the thresholds would be quite intricate in itself, as "there is a fine line between introducing a transaction value threshold which is too low and captures too many transactions and one which is too high and does not capture enough."[52] For all these reasons, the Special Advisers suggested taking stock from the Austrian and German reforms before drawing conclusions at EU level.[53]

However, three years have already passed since Germany and Austria opted for the transaction value-based thresholds and there still seems to be no consensus on the suitability of this model. On the one hand, the German and Austrian NCAs reported that (i) the thresholds have not led to a significant increase in administrative burden, as only a few dozen cases have been further notified, and that (ii) they were well-tuned to capture transactions in the most problematic sectors, namely in the IT, pharmaceutical and chemical industries.[54] On the other hand, the Commission found that "the absence of a complementary value-based jurisdictional threshold did not […] appear to have necessarily been a decisive factor in potentially relevant transactions not being captured by

[48] M. SAUERMANN, "New merger control guidelines for transaction value thresholds in Austria and Germany", *Competition Policy International*, July 26, 2018.

[49] EC Report, p. 114; SWD, para. 127.

[50] EC Report, p. 114.

[51] *Idem.*

[52] *Idem*.

[53] *Ibid*, pp. 115-116.

[54] The Bundeskartellamt and the Bundeswettbewerbsbehörde have published reports that explain the authorities' experiences with the transaction value-based thresholds. In this connection, see M. SAUERMANN, "The Transaction Value Threshold in Germany: Experiences with the New Size of Transaction Test in Merger Control," *Competition Policy International*, October 8, 2019.

the EU Merger Regulation."[55] According to the Commission, "[t]his was because not all of [competitively relevant] transactions would appear to constitute high-value deals and the transaction value may not always be sufficiently correlated with the potential competitive significance of the companies acquired."[56] This is for instance illustrated by Table 2 above. Moreover, the Commission reviewed the application of the value-based thresholds in Germany and Austria[57] and concluded that they "have not resulted as yet in capturing additional anticompetitive transactions, as all transactions notified on [that basis] have been cleared unconditionally. As to the digital sector in particular, these thresholds do not appear so far to have brought many additional relevant cases under review."[58] Still, the Commission noted that "it may be still too early to draw firm conclusions" and did not completely close the door to a possible reform of the turnover thresholds.[59]

iii. <u>Communication obligations to undertakings with "strategic market status" or "gatekeepers"</u>

For its part, the Furman Report made the recommendation to "[require] digital companies that hold a "strategic market status" *to make* the CMA *aware* of their intended acquisitions [to] allow the CMA to determine in a timely manner which cases warrant more detailed scrutiny" (emphasis added).[60] According to the report, the "strategic market status" would be granted to undertakings holding market power over a strategic bottleneck market.[61] Similarly, the Commission proposed in its Digital Markets Act that "gatekeeper" platforms "*inform* the Commission of all of their intended and concluded acquisitions of other providers of core platform services or any other

[55] SWD, para. 113.

[56] *Ibid*, para. 113. See also para. 135: "the Commission services' research shows that while a high value or a high value-to-turnover ratio may well be indicative of competitively significant transactions, it is not in itself decisive since many such transactions appear to carry little competitive significance. Moreover, the Commission services' research also identified potentially significant transactions that did not meet the criteria of high-value or high value-to-turnover-ratio transactions, including notably in the digital sector."

[57] *Ibid*, paras. 122 et seq.

[58] *Ibid*, para. 125.

[59] *Ibid*, paras. 123 and 136.

[60] Furman Report, p. 12.

[61] *Ibid*, p. 10. Likewise, the Stigler Report proposed special conduct requirements for platforms with "bottleneck power", pp. 7, 32-33, 105-106, 111 et seq.

services provided within the digital sector" (emphasis added).[62] According to the DMA, the "gatekeeper status" would be granted to a provider of core platform services, as defined in Article 2(2), where: (i) it has a significant impact on the internal market; (ii) the service provided is an important gateway for business users to reach end users; and (iii) it enjoys an entrenched and durable market position or it is foreseeable that it will enjoy such a position in the near future.[63]

This mechanism should be designed in such a way that avoids each and every transaction being *notified* in the traditional sense, minimizing the administrative burden for authorities and transaction costs for firms. And the process should be much speedier than the existing Commission simplified procedure. Following the Furman Report and the DMA proposals, the undertakings with the designated status should therefore only have to *communicate* basic information to the authorities about their planned transactions. However, besides the "formal" information set out in Articles 3(3) and 3(2) DMA, the information requested should focus instead on the elements that would be necessary to make a preliminary substantive assessment. That could be based, for instance, on the proxies outlined in section IV.B.3 below, such as (i) the key assets and capabilities of the target, (ii) the commercial rationale of the acquisition, and (iii) its pro-innovative effects.

The communication mechanism could be particularly effective in combination with the Communication on Article 22 EUMR and the *ex post* mechanisms that will be discussed in section III.C. below. As noted by the Commission in the DMA, this would "provide information that is crucial to monitoring broader contestability trends in the digital sector and [could] therefore be a useful factor for consideration in the context of the market investigations".[64]

iv. <u>Extension of the notions of "undertaking" or "concentration"</u>

Finally, another concern should be briefly considered. Many of the acquisitions by digital incumbents do not even target "whole companies" as such, but focus on acquiring key assets and capabilities, including talented engineers and entrepreneurs (*i.e.*, "acqui-hires" or "talent

[62] Proposal for a Regulation on contestable and fair markets in the digital sector, COM(2020) 842 final of December 15, 2020 ("DMA"), recital 31 and Article 12. Article 2(4) DMA defines "digital sector" as "the sector of products and services provided by means of or through information society services".

[63] DMA, Articles 2(2) and 3(1).

[64] DMA, recital 31.

acquisitions").[65] However, there is no reason why these acquisitions could not be captured with a broader understanding of the notion of "undertaking", especially when the acquired assets, capabilities or human capital are integral to and determine the *economic fate* of the start-ups they belong to. These acquisitions could also be subsumed under Article 3(1)(b) EUMR, which already qualifies as a "concentration" an acquisition of direct or indirect control over the whole "or parts" of an undertaking, including "by purchase of […] assets, by contract or by any other means".

C. *Ex Post Control and Deterrence Mechanisms*

i. *Ex post* merger control review

Another option that has been widely discussed is the possibility of introducing a system of *ex post* merger control, following the example of the US. Since the latter system is the most well-known, it will be used as an example, but there are many other countries that have adopted *ex post* merger control systems, albeit with different nuances, like the UK, Australia, Sweden, Austria, Hungary or Lithuania.[66] This system has also been proposed for reform in France recently, but seems to have been ultimately abandoned.[67]

In the US, the thresholds are not jurisdictional, allowing the FTC to review and prohibit transactions that have already been consummated. This system could be interesting for several reasons. First, it would enable the competition authorities to better assess the real potential of the target companies and their innovative projects, as they are often acquired at a very early stage of development. The competitive effects of the transaction could be better evaluated once the transaction's implementation has commenced. Second, an *ex post* prohibition decision would pose fewer practical problems in this area, as the contours of the transaction are usually better-defined. Given that the typical target are small start-up companies with a few key assets and capabilities,

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[65] J. F. COYLE and G. D. POLSKY, "Acqui-Hiring", Duke Law Journal, Vol. 63, p. 281, 2013, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2040924.

[66] J-M. COT, "Contrôle des concentrations *ex post:* Surmonter les peurs de part et d'autre", *Concurrences*, Nº 1-2020, p. 34.

[67] For an interesting debate on the reform, see Concurrence's dedicated issue, "Faut-il généraliser les évaluations *ex post*?", *Concurrences*, Nº 1-2020, pp. 22-38. "Publication of the new French merger control guidelines", *Bird and Bird*, October 2020.

these could be readily detected and extracted from the merged entity to reverse the transaction. Still, there could be some cases where undoing the transaction would prove impractical, for instance, in know-how-based acquisitions, or where the targets are data sets or user bases that are mixed up post-transaction, as happened in *Facebook/WhatsApp*.[68]

On the other hand, this system would create significant legal uncertainty if, like in the US, no time limits were put in place for the opening of an investigation. For the *ex post* system to be properly calibrated, it would thus be necessary to set a relatively short time limit after which transactions could no longer be reviewed. A time limit around six months, similar to that set out by the Commission in its Communication on Article 22 EUMR, *a priori* seems to be a reasonable period that would mitigate the legal uncertainty.[69]

ii. <u>Killer acquisitions as an abuse of dominance under Article 102 TFEU</u>

Another possibility would be to apply Article 102 TFEU to acquisitions of nascent competitors by incumbent digital firms, as the Commission did in *Tetra Pak I*. In that case, the Court of First Instance upheld the Commission's finding that

> *the acquisition by an undertaking in a dominant position of an exclusive patent license for a new industrial process constitutes an abuse of a dominant position where it has the effect of strengthening the undertaking's already very considerable dominance of a market where very little competition is found and of preventing, or at least considerably delaying, the entry of a new competitor into that market, since it has the practical effect of precluding all competition in the relevant market.*[70]

This case shares many traits with the killer acquisition scenario and there is no reason in principle why its rationale could not be extended. The application of Article 102 TFEU would provide the Commission with a more complete enforcement toolbox, as it would (i) serve as a general deterrent; (ii) require a lighter burden of proof than merger control; and (iii) allow the

[68] *Facebook/WhatsApp* (Case COMP/M.8228), Commission decision of May 17, 2017.

[69] Communication, para. 21.

[70] Judgment of July 10, 1990, *Tetra Pak Rausing SA v. Commission*, Case T-51/89, EU:T:1990:41, see summary of the ruling.

Commission to sanction strategies aimed at systematically neutralizing nascent competitors by establishing a single and continuous infringement. In fact, this possibility has been explored, across the Atlantic, by the FTC under Section 2 of the Sherman Act, which is comparable to Article 102 TFEU.[71] On December 9, 2020, the FTC thus found that Facebook had breached US antitrust laws by systematically targeting and buying-off nascent competitors.[72] Accordingly, the FTC requested the District Court of Columbia to "break-up" Facebook by divesting Instagram and WhatsApp.[73]

But this enforcement action also raises further questions. Notably, can a competition authority, after it has reviewed a transaction, open an investigation for abuse of dominance years later?[74] The answer might be different depending on the nature of the merger control regime. As mentioned above, the US has an *ex post* merger control system that does not contain a mandatory pre-approval mechanism. This is precisely what allowed the FTC to re-open the investigation into Facebook's activities and contest a breach of US antitrust rules.[75] As the FTC's letter to Facebook expressly advanced at the time of the acquisition of Instagram, "[t]his action is *not* to be construed as a determination that a violation may *not* have occurred […]. The Commission *reserves the right to take such further action* […]" (emphasis added).[76] And, indeed, the FTC has followed-up. Facebook's PR claims criticizing the FTC's lawsuit as "revisionist history" are therefore mostly ill-founded.[77] On the other hand, such arguments would hold stronger in the EU, where in principle it would not be possible to reopen the vault, given that the EU and UK competition authorities concluded by "final decision" that Facebook's acquisitions of WhatsApp and Instagram were not

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[71] See E. KRAUS' contribution at the 7th Global Merger Control Conference (Paris – December 6, 2019).

[72] FTC Sues Facebook for Illegal Monopolization, Federal Trade Commission, Press release of December 9, 2020.

[73] *Idem.*

[74] D. PÉREZ DE LAMO, "The Federal Trade Commission Requests to Break-Up Facebook", *Agenda Pública*, December 18, 2020, available at: https://agendapublica.es/the-federal-trade-commission-requests-facebook-to-break-up/.

[75] *Idem.*

[76] Closing Letter to Counsel for Facebook, Inc., Federal Trade Commission, August 22, 2012, available at: https://www.ftc.gov/enforcement/cases-proceedings/closing-letters/facebook-inc-instagram-inc.

[77] "Facebook calls antitrust lawsuits 'revisionist history'", The Verge, December 9, 2020. Though a separate and better-placed question would be: has not it taken too long for the FTC to act (*i.e.*, > 6-8 years)? By contrast, Article 25(1)(b) of Regulation 1/2003 establishes a limitation period of 5 years for the Commission to sanction infringements of Article 102 TFEU. Could these *individual* acquisitions be considered as part of a "single and continuous infringement", thus prolonging the limitation period?

problematic in 2014[78] and 2012[79] respectively (*i.e.*, *venire contra factum proprium non valet*).[80] As a result, it also remains to be seen what impact would disparate decisions of the US-EU competition authorities have on Facebook and its acquisitions.

D. A Flexible Approach

Throughout this section, a series of mechanisms to capture acquisitions of nascent competitors by technology incumbents have been individually discussed, highlighting their respective strengths and weaknesses. These systems should not be considered to be mutually exclusive or in an isolated manner. On the contrary, it would be most effective and sensible to combine them, by including different sorts of *ex ante* and *ex post* mechanisms.

IV. SUBSTANTIVE ASSESSMENT

Apart from establishing a system of mechanisms to capture acquisitions of nascent competitors by digital incumbents, their competitive assessment should be rethought. The analysis will vary depending on whether the acquirer and the target have directly overlapping products.

A. Horizontal Mergers: Transactions with Overlap

In these cases, the assessment will be relatively simple since the acquisition would not pass the substantive test of the EUMR, as it would lead to a significant impediment of effective competition ("SIEC"): *i.e.*, acquiring a promising start-up would strengthen the incumbent's dominant position by removing and integrating a potential challenger.[81] Again, this would be in line with *Tetra Pak I*, where Tetra Pak's acquisition of the only relevant competing technology was deemed an abuse of

[78] Commission Decision of 3 November 2014, *Facebook/WhatsApp*, Case no M.7217.

[79] OFT Decision of 14 August 2012, *Facebook/Instagram*, Case no ME/5525/12.

[80] Unless new evidence surfaces that was (i) unavailable to and (ii) could not have been obtained by the competition authorities at the time of the approval of the transactions, had they acted as a diligent administration.

[81] Provided that there are no other relevant countervailing efficiencies.

dominance because it had the effect of strengthening the undertaking's already very considerable position in a market where very little competition could be found.

With the benefit of hindsight, this should have been the case in *Facebook/Instagram*, where the OFT summarily dismissed the potential competition issue in relation to the supply of social network services.[82] The differences in functionalities highlighted by the OFT were rather negligible and a broader relevant market definition from the users' side would have been more sensible. In any case and leaving the specifics of that case aside, the way in which relevant markets are determined, as well as potential competition, should likely be updated because the current Market Definition Notice dates from 1997.[83] The Commission's initiative to reconsider it is hence welcomed.[84]

B. Non-Horizontal Mergers: Transactions without Overlap

Conversely, when the target company has fringe products and operates in an adjacent market, it will be significantly more complicated to assess the competitive effects of the transaction. The problem arises because the Commission must prove, to the requisite legal standard, that the target is a potential competitor in the acquirer's core market.

i. Proposals to Reverse and/or Reduce the Burden of Proof

Due to the difficulty of this exercise, the possibility of reversing the burden of proof has been raised, most famously by Tommaso Valletti, the previous Chief Economist of DG Competition,[85] but also by the Stigler and ACCC Reports.[86] According to this proposal, acquisitions of nascent competitors

[82] *Facebook/Instagram* (Case ME/5525/12), OFT Decision of August 22, 2012, paras. 15-25.

[83] Commission Notice on the definition of relevant market for the purposes of Community competition law, December 9, 1997.

[84] See M. VESTAGER's announcement on December 9, 2019, at the Chillin' Competition Conference: "Defining markets in a new age."

[85] "DG Comp chief economist: Reverse burden of proof to catch killer acquisitions," *Global Competition Review*, November 20, 2018.

[86] Stigler Report, pp. 111 et seq.: "specific merger regulations should require merging firms to demonstrate that the combination will affirmatively promote competition."; ACCC, Digital Platforms Inquiry, Final Report, p. 109: "The ACCC considers it may be worthwhile to consider whether a rebuttable presumption should also apply, in some form, to merger cases in Australia. […] it signals that, absent clear and convincing evidence put by the merger parties, the starting point for the court is that the acquisition will substantially lessen competition."

by digital incumbents should be presumed anticompetitive unless the parties can prove that the transaction would bring significant efficiencies. The authorities would no longer have the obligation to prove the potential anti-competitive effects of the merger as a result. Instead, it would be up to the parties to demonstrate its pro-competitive effects and the lack thereof would result in the transaction being prohibited.

In addition to reversing the burden of proof, various proposals have been made to reduce it. In this sense, the Furman Report laid down a much-debated proposal according to which the CMA should be bolder and "more economically oriented" by changing the evidentiary standard from a "balance of probabilities"[87] to a "balance of harms." In essence, the idea would be to loosen the evidentiary standard in mergers with a "potentially very large scale of lost benefits." That would mean that, when the magnitude of the harm is considerable, the evidentiary standard would be lowered from a "more likely than not" to a "realistic prospects" standard.[88] According to the Furman Report, this should be amended despite some "occasional rare false positive along the way."

While these modifications may seem tempting at first, the reality is that they has been widely rejected by the antitrust community because they present several critical flaws.[89] First, it is hard to define on paper for exactly which transactions the burden of proof would be reversed/reduced, and it is clear that this should not be left to the discretion of the authorities on a case-by-case basis. Second, such an evidentiary asymmetry[90] would leave the competition authorities with an incommensurate level of unbacked (and thus, incontestable) discretion which could result in arbitrary decision-making. As the famous astronomer Carl Sagan once put it, "extraordinary claims require extraordinary evidence" or, equally, "what can be asserted without evidence can be dismissed without evidence."[91] Third, there are no economic or empirical reasons to justify such a

[87] The Commission has a very similar legal standard: "significant likelihood" (Horizontal Merger Guidelines, para. 60).

[88] That the negative effects are merely "likely to occur."

[89] See, for instance, T. LÉCUYET, "Digital conglomerates and killer acquisitions – A discussion of the competitive effects of start-up acquisitions by digital platforms," *Concurrences*, Nº 1-2020, pp. 42-50.

[90] It is a basic evidentiary principle that the size of one's claims should be directly proportional to the evidence put forward.

[91] Known as "HITCHENS's razor".

change because, as was shown in section II above, most acquisitions by digital incumbents foster innovation, either directly or indirectly.

To presume that all such transactions are anticompetitive without empirical justification whatsoever would be harmful to the competitive process, innovation and, ultimately, consumers. In any event, it is doubtful whether these changes would work in practice. With respect to the reversal of the burden of proof, parties will generally be able to come up with some sort of efficiency rationale, bringing the authority back to square one. Indeed, how much more efficient should the transaction be when the anti-competitive effects were never established? Any efficiencies would suffice. Further, non-horizontal mergers are generally considered to be more efficient than not, given the complementarities of the parties.[92] As for the balance of harms proposal, the authority would need to (i) identify a range of possible future outcomes, (ii) estimate their probability, and (iii) assess their impact on customer welfare, which is likely to raise insurmountable practical hurdles.[93]

ii. Novel Theories of Harm: Platform Envelopment

For its part, the EC Report proposed a novel theory of harm based on a "broader view of the position of the incumbent in a market for the digital ecosystem," where the harm would derive from the strengthening and enclosing of a particular "user space" by expanding network effects from one platform to another.[94] Similarly, Gautier & Lamesch suggested that the main damage to competition and innovation may derive from conglomerate effects, as digital incumbents consolidate and expand their market power by acquiring to reinforce and leverage their core segments.[95]

The novel theory of harm proposed by the EC Report also displays significant shortcomings. Primarily, it is difficult to grasp what the actual harm is in this theory: are users, as a consequence of the acquisition, paying a higher price, enjoying lower quality or less choice? If anything, it seems that users decide to stay on the newly created platform because they derive significant added value

[92] EC Non-Horizontal Merger Guidelines, para. 11 et seq.

[93] T. LECUYET, *supra* note 89, pp. 45-46.

[94] EC Report, p. 122.

[95] A. GAUTIER & J. LAMESCH, *supra* note 14.

from the strengthened network effects, as well as from the substantial economies of scope, consumption synergies and complementarities created.[96] That is why conglomerate mergers are generally procompetitive.[97] It is true that conglomerate mergers can lead to foreclosure, but that potential concern can already be tackled with existing tools, as demonstrated by the Non-Horizontal Merger Guidelines[98] and abuse of dominance case law/decisional practice on bundling and tying practices. By accepting this theory of harm, in reality, we would be transforming the mere potential for foreclosure into the actual harm itself, unduly anticipating the analysis. For these reasons, the proposal of the EC Report seems both unsatisfactory and unnecessary.

iii. The Innovation Competition Approach

This paper submits that the "innovation competition" approach would provide the necessary tools to tackle the intricate problem at stake. In a series of cases ranging from *Novartis/GlaxoSmithKline*[99] and *GE/Alstom*[100] to *Dow/DuPont*[101] and *Bayer/Monsanto*,[102] the regulated framework of the pharmaceutical, industrial manufacturing and agro-chemical sectors allowed the Commission to capture restrictions of competition at an early stage, that is, before any anticompetitive effect on the relevant market could be predicted with enough certainty. This means that, if we managed to extrapolate the innovation competition methodology to digital transactions, it would not be necessary to establish a traditional "potential competition" relationship to the (highly-demanding) requisite legal standard. Instead, we would need to show that the target company is both pursuing a discernible innovation objective (namely developing a potentially competing product from an adjacent market), and that it has the ability to carry it through. In this respect, it would not matter if it is still uncertain whether the product under development will in fact end up competing with the existing product or whether it will eventually reach the market at all: as it was established in those

[96] T. Lecuyet, *supra* note 89, pp. 46-50.

[97] EC Non-Horizontal Merger Guidelines, para. 11 et seq.

[98] *Ibid*, para. 93 et seq.

[99] *Novartis/GlaxoSmithKline Oncology Business* (Case COMP/M.7275), Commission Decision of January 28, 2015.

[100] *General Electric/Alstom* (Case COMP/M.7278), Commission Decision of September 8, 2015.

[101] *Dow/DuPont* (Case COMP/M.7932), Commission Decision of March 27, 2017.

[102] *Bayer/Monsanto* (Case COMP/M.8084), Commission Decision of March 21, 2018.

cases, the object of protection would be the *incentive of the parties to innovate*, that is, the *innovative process per se.*[103]

The EC Report explicitly rejected the application of the innovation spaces methodology to digital transactions on the ground that in that sector, as opposed to the heavily regulated pharmaceutical and agro-chemical industries, R&D does not take the form of a distinct and well-structured process with clearly identifiable research poles.[104] In contrast with this statement, the Commission has managed to shift outside of the pipelines framework in the last agro-chemical cases *Dow/DuPont* and *Bayer/Monsanto* to define innovation spaces at the level of "early R&D efforts". As shown in these cases, a holistic approach based on an analysis of factors such as (i) essential resources (*e.g.*, intellectual property rights, data sets, large user bases, specialized and expensive hardware, access to financing, engineering skills, and computation power);[105] (ii) capabilities (as a function of the company's skillset, strategy, governance structure, and past behavior);[106] (iii) patent overlaps; (iv) investment plans of the merging parties setting innovation targets; and (v) internal documents of the acquirer with post-merger divestment plans, should allow the Commission to define the relevant *innovation space* and perform an innovation competition assessment in digital transactions, despite the absence of pipelines.[107] In this regard, instead of a classic innovation competition setup of overlapping pipeline products or early R&D efforts (as in *Dow/DuPont*), the

[103] In the abovementioned cases, the Commission has repeatedly established that it is irrelevant to the innovation competition assessment that the innovative process is highly uncertain, that is, the fact that *ex ante* the relevant developing products may still have a low probability of getting to the market or, even if they do, of ending up competing against each other in the future. Instead, what matters is that if two competing innovation projects fall in the same hands as a result of a merger, the incentive to innovate will disappear and, consequently, the projects will be stopped. Unless the incentives of the parties to keep innovating are maintained by keeping the projects separate, the potential innovative outcome at stake will never take place (provided that the resulting company does not have other incentives to still carry it through).

[104] EC Report, p. 120.

[105] W. KERBER, "Competition, Innovation, and Competition Law: Dissecting the Interplay," (2017) 42, *MAGKS Joint Discussion Paper Series in Economics*, pp. 15-16.

[106] J. G. SIDAK & D. J. TEECE, "Dynamic Competition in Antitrust Law," (2009) 5(4), *Oxford Journal of Competition Law and Economics*, pp. 614-617.

[107] Similar suggestions have been made by M. BOURREAU & A. DE STREEL, "Digital Conglomerates and EU Competition Policy," (2019), p. 27-28; W. KERBER, *supra* note 105, pp. 15-16. This approach has been recently endorsed by OECD experts at the Competition Open Day 2020 (Paris - February 26, 2020), see P. GONZAGA's contribution in the third panel dedicated to "Merger Control in Dynamic Markets."

situation would present an existing product that is threatened by an incoming innovative product in the pipeline (as was the case in *Medtronic/Covidien*[108]).

In fact, the EC Report later accepted that this approach may "obviously" be relevant in some circumstances where essential resources or capabilities are present, but did so to underline that because of their absence at an early stage, the methodology would rarely be applicable to the acquisition of incipient start-ups.[109] This point seems unconvincing because, in order to raise any competition concerns, early and targeted acquisitions must be triggered for a specific reason. There must be something particularly valuable about the target company, in terms of assets or capabilities, for the incumbent to find it promising and to acquire it (usually for a significant sum) instead of just replicating the technology or product in question. If no key assets or capabilities are detected, on the contrary, the transaction should logically not raise any competition concerns at all, as the relevant innovation space would consequently be much wider. In that case, the acquisition by the incumbent firm would be merely speculative (or just neutral to competition) and any competition concern raised by the authorities would equally be unsubstantiated. This should not, however, constitute an argument for the non-application of the innovation competition approach.

Recent developments suggest that the Commission may have ultimately opted for this approach. The Communication on Article 22 EUMR sets out a series of similar criteria that the Commission will consider in accepting referrals. That includes cases where the target: (i) is a nascent competitor "with significant competitive potential" that has yet to develop "a business model generating significant revenues;" (ii) is an "important innovator or is conducting potentially important research;" (iii) is an "actual or potential important competitive force" in the sense of paras. 37-38 of the Horizontal Merger Control Guidelines; (iv) has access to "competitively significant assets" (*e.g.*, raw materials, infrastructure, data, or intellectual property rights); and/or (v) provides products or services that are "key inputs/components for other industries."[110] In addition, the Commission "may also take into account whether the value of the consideration

[108] *Medtronic/Covidien* (Case COMP/M.7326), Commission Decision of November 28, 2014, paras. 247-250.

[109] EC Report, p. 120.

[110] Communication, para. 19.

received by the seller is particularly high compared to the current turnover of the target."[111] But it remains to be seen whether the Commission will also carry out the *substantive assessment* of transactions referred to it on the same basis. The Commission's first decisions in *Illumina/Grail* and *Facebook/Kustomer* will give further indications.[112]

V. CONCLUSION

This paper addressed concerns and challenges relevant to the antitrust assessment of killer acquisitions, providing a general framework for their assessment.

Based on the available empirical evidence, it appears that the majority of acquisitions by digital incumbents actually do not have the objective of eliminating competition but, on the contrary, foster innovation in at least two ways: (i) by promoting innovative efforts and (ii) integrating complementary products and capabilities (*i.e.*, bolt-on acquisitions). Nevertheless, acquisitions of nascent competitors merit review by competition authorities. This is because nascent competitors have the potential to disrupt existing competitive paradigms and deliver significant benefits for consumers.

Killer acquisitions are, however, elusory in nature. A series of *ex ante* and *ex post* control mechanisms to capture killer acquisitions were thus examined. In particular, this paper discussed the strengths and weaknesses of the following *ex-ante* mechanisms: (i) the EUMR's referrals from NCAs to the Commission, with particular emphasis on the Commission's recent Communication on Article 22 EUMR; (ii) the possible reform of the EUMR thresholds to include complementary thresholds based on transaction value; (iii) the imposition of communication obligations to undertakings designated as having "strategic market status" or "gatekeepers", following the Commission's DMA proposal; and (iv) the possible extension of the notions of "undertaking" or "concentration" to capture acquisitions that are targeted at particular assets, capabilities and human capital (*i.e.*, acqui-hires). In so doing, the analysis also covered the Commission's recently-

[111] *Idem.*

[112] See above section III.B.i.

published SWD, which carried an in-depth review of jurisdictional aspects of EU merger control based on a wide body of evidence. Furthermore, this paper explored the possibility to complement traditional *ex ante* control mechanisms with *ex post* tools, such as *ex post* merger review and Article 102 TFEU, following the enforcement experience in the US. In this sense, it is underlined that all of these mechanisms should not be viewed as mutually exclusive, but be combined instead to be most effective.

Finally, this paper reviewed a variety of proposals for the substantive assessment of acquisitions of nascent competitors –though most were considered inadequate. Instead, it is recommended that the Commission adopt the so-called "innovation competition" approach, as previously developed in in the Commission's decisional practice relating to mergers in the pharmaceutical, agrochemical and industrial sectors (namely in *Novartis/GlaxoSmithKline*, *GE/Alstom*, *Dow/DuPont*, and *Bayer/Monsanto*). Recent developments, like the Communication on Article 22 EUMR, suggest that the Commission may have opted for this approach.