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KILLER ACQUISITIONS AND COMPETITION LAW: IS THERE A GAP AND HOW SHOULD IT BE FILLED?

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Abstract – In innovation-driven budding markets, there is a high likelihood of 'killer acquisitions'. Killer acqui- sitions stifle potential competition where an established player eliminates an innovative new product or removes the potential competitor entirely in its nascent stage. An established, and often cash-rich, large entity's fear of an innovative competitor undermining its market position incentivises it to make an acquisition with the intent to eliminate future competition. Many jurisdictions, such as India, lack adequate merger control regulations to restrain such acquisitions. This article highlights juris- dictional and substantive gaps which allows killer acqui- sitions to escape scrutiny.

Jurisdictional gaps emerge when the threshold for scrutiny is based on turnover or asset value of the parties involved.Start-ups and new companies having negligible turnovers escape the regulatory radar when acquired by a large player. Substantively, merger controls are based on the potential merger's impact on competition in the relevant market, whichis difficult to assess in the case of early-stage start-ups where products are at a nascent stage.

Instances of under-enforcement of competition law in cases of killer acquisitions are common, as the new company's potential is underestimated. Such under-enforcement may not be systemic in most jurisdictions, but poses a serious concern with consequences bordering on monopolisation in certain markets.

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I. INTRODUCTION

Visitors to London who have used the Central Line on the underground system will have heard an announcement, on arrival at Bank Station, "Mind the Gap!". As the door opens, the curvature of the platform, set against the linearity of the carriage, reveals a significant gap between the train and the platform. Care is essential when exiting (and entering!) the train; stumbling into the gaping hole could have extremely unpleasant consequences. An issue that has been much discussed in recent years is whether a similar gap exists in the competition law systems of the world: is there a danger that so-called "killer acquisitions" might fall into a legal gap with the result that they escape proper scrutiny under merger control, thereby stifling the emergence of future competitors to powerful incumbents in the market? This topic has spawned an extensive literature;[2] it has been debated in international fora;[3] and, as we will see, has led to legislative changes in some jurisdictions and proposals for change in others. This article will explore the debate about killer acquisitions. Section 2 will begin by explaining what is meant by the expression; section 3 will consider what the gap, assuming it to exist, consists of; in section 4 the concern that there may have been under-enforcement in the case of killer acquisitions will be considered; section 5 will set out some legislative changes that have already been adopted to fill the gap or that are in contemplation (including in India). Conclusions will be found in section 6.

II. WHAT IS A KILLER ACQUISITION?

There is no formal definition of a killer acquisition; it is not a term of art. However, it is not difficult to convey the gist of the idea: that some acquisitions may be the consequence of an incumbent firm's desire to stifle potential competition, either by eliminating a new product or technology that would have challenged its position or by removing the potential competitor.

In some sectors, dynamic innovation is a particularly important feature of competition; typical examples are digital platform markets and the pharmaceutical sector, though there are many others. In the case of the digital economy the world has been transformed in an astonishingly short period of time by the

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[2] Axel Gautier and Joe Lamesch, 'Mergers in the Digital Economy' (2020) CESifo Working Paper 8056; Colleen Cunningham, Florian Ederer and Song Ma, 'Killer Acquisitions' (2021) 129 (3) Journal of Political Economy 649; Elena Argentisi and others, 'Merger Policy in Digital Markets: An Ex Post Assessment' (2021) 17(1) Journal of Competition Law and Economics, 95; Peter Alexiadis and Zuzanna Bobowiec, 'EU Merger Review of "Killer Acquisitions" In Digital Markets - Threshold Issues Governing Jurisdictional and Substantive Standards of Review' (2020) 16(2) Indian Journal of Law and Technology 64.

[3] OECD Roundtable, *Start-ups, Killer Acquisitions and Merger Control* (2020) <www.oecd.org/competition>; ICN, *Conglomerate Mergers Project Report* (2019-20), <www.internationalcompetitionnetwork.org>; UNCTAD *Competition Issues in the Digital Economy* (2019) <www.unctad.org>.

emergence of firms such as Alphabet, Apple, Meta, Amazon and Microsoft (AAMAM – formerly known as GAFAM when Alphabet was Google and Meta was Facebook). These firms have brought a range of products and services to the market that have benefitted hundreds of millions, if not billions, of people; digital technology has transformed the lives of the most impoverished citizens in the world, often at no monetary cost to themselves. People now have access to communications systems, knowledge and education, financial services and healthcare that were unavailable only a few years ago. The creative energy that led to the development of these platforms is enormous, and public policy must avoid interventions that could inhibit pro-competitive endeavours of this kind. On the other hand, there is little doubt that these platforms have acquired immense market power, in particular where economies of scale and scope, powerful network effects, the tendency of markets to 'tip' and high barriers to entry and expansion are found in conjunction. There is a danger that some platforms will monopolise markets to the exclusion of existing or would-be competitors, becoming the equivalent in the 21st century of the railroads and industrial trusts that inspired the adoption of the Sherman Act in the US in the late 19th century.[4]

For some time, governments, competition authorities and think tanks worldwide have been aware of the increasing market power of the digital platforms, and there has been a profusion of policy pronouncements and reports on the subject. In June 2019, the competition authorities of the 'G7 countries'[5] and the European Commission published a *Common Understanding on Competition in the Digital Economy*, which stressed the need for international cooperation and convergence in competition matters, in particular in relation to the digital economy which, by its nature, is borderless.[6] A report by Crémer, de Monjoye and Schweitzer was prepared for the European Commission (the '*Crémer Report'*)'[7] and, in the UK, the *Furman Review* made recommendations to theUK Government.[8] Two important documents were produced in the US, by the Stigler Center for the Study of the Economy and the State[9] and the US House Committee on the Judiciary.[10] Numerous other reports have been published.[11]

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4 Herbert Hovenkamp, *Enterprise and American Law 1836-1937* (Harvard University Press 1991); Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age (*Atlantic Books 2018).

5 Canada, France, Germany, Italy, Japan, the UK, and the US.

6 ˋAutorité de la concurrence' (5 June 2019) <www.autoritedelaconcurrence.fr> accessed 26 November 2022.

7 *Competition Policy for the Digital Era: Final Report*, (*European Union*, 2019) <www.ec.europa.eu>.

8 *Unlocking Digital Competition: Report of the Digital Competition Expert Panel* (March 2019) <www.gov.uk> accessed 26 November 2022.

9 *Stigler Committee on Digital Platforms: Final Report, 2019* <www.research.chicagobooth.edu> accessed 26 November 2022.

10 *Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations* (6 October 2020) <www.judiciary.house.gov> accessed 26 November 2022.

11 See e.g., in Germany *a New Competition Framework for the Digital Economy, 2019* <www.bmwi.de> accessed 26 November 2022; in Australia *Digital Platforms Enquiry: Final Report,*

All of these reports noted that improvements were needed to existing competition law and practice to address the challenges presented by digital platforms.

In the pharmaceutical sector, lives have been fundamentally changed by the development of drugs and treatments unimaginable to our ancestors. The world will emerge eventually from the ghastliness of the Covid-19 pandemic as a result of the vaccinations developed by a number of pharmaceutical companies at remarkable speed. Pharmaceutical companies compete with one another to develop 'blockbuster' drugs which, with the benefit of patent production, provide a rich stream of revenue for many years. This reward provides the incentive to engage in risky research and development ('R&D') which, though often unsuccessful, sometimes succeeds spectacularly.

The gains to successful firms in markets such as digital platforms and pharmaceuticals are potentially vast; venture capitalists with an appetite for risk are willing to provide substantial funds to enable firms to get started, in the hope that some (but of course by no means all) will 'hit the jackpot'. The market capitalisation of AAMAM is eye-wateringly high; numerous other examples of successful and lucrative innovation that have led to enormous financial reward are easy to think of— electric cars are an obvious case. The possibility of huge financial rewards obviously incentivises the owners of capital and the innovators themselves to invest time and money in the quest for ever-cleverer products. The innovation landscape is a very competitive one: there is no doubt that 'dynamic' competition stimulates technological research and development. Schumpeter was a champion of the notion that the motivation to innovate was the prospect of monopoly profits and that, even if existing monopolists earned such profits in the short term, outsiders would in due course enter the market and displace them.[12] Schumpeter argued that a "perennial gale of creative destruction" would be sufficient to protect the public interest, so that short-term monopoly power need not cause concern. In some market-based economies, dynamic efficiency may be more important than allocative and productive efficiency. In markets such as this, it is important not to adopt too 'static' a view of the state of competition; a firm may have a high market share at a particular point in time but be vulnerable to entry by a firm with new technology. A 'dynamic' view of the market is needed when deciding whether an incumbent firm has market power. In principle, it has always been necessary to look at the dynamic as well as the static state of competition in markets; however, this topic has become more significant in the era of digital platform markets and other high technology sectors, where a firm with an apparently unassailable position in a particular market may quickly be toppled by a vigorous new entrant. Firms such as Xerox and IBM, that dominated their industries at a particular time in history, subsequently found themselves

2019 www.accc.gov.au accessed 26 November 2022; in Japan *Report Regarding Trade Practices on Digital Platforms* <www.jftc.go.jp> accessed 26 November 2022.

12 Joseph A Schumpeter, *Capitalism, Socialism and Democracy* (Harper 1942).

engulfed by competitive forces. Microsoft's leadership in operating software for personal computers was undermined as cloud technology diminished their importance as a place to store data. In the world of social media My Space disappeared almost as quickly as it emerged.[13] AAMAM undoubtedly enjoy very powerful positions in their respective markets in 2021; however, it remains to be seen how the competitive landscape will look in, say, 2025. Schumpeter's 'perennial gale of creative destruction' may affect even the most powerful economic operators; yesterday's monopoly may be overcome by tomorrow's innovation.[14]

In this Schumpeterian world, the threat to successful incumbents in the market is not so much competition within the existing market, but potential competition from firms that might enter the market in the future; IBM's 'monopoly' in mainframe markets was eclipsed by Microsoft's move into the market for desktops and laptops using its operating software; in turn Google emerged and the world observed another eclipse. Without doubt there will be further astronomical observations in the future. It is the *potential* competitor that can exercise a competitive constraint on firms that are active in dynamic markets, and a sophisticated analysis of competition law cases should always take into account this important feature of competition. However, at this stage we begin to see that there might be a 'gap' in the tools of competition law; what if an incumbent firm, aware that it is potential competitors that might one day undermine their market position, were to adopt a policy that it will acquire any such firms that it sees emerging on the horizon? Alternatively, the incumbent's policy might be to acquire any new product or technology that might become a competitive threat; some commentators on the pharmaceutical sector expressed concern that acquisitions of promising new drugs and treatments sometimes led to their discontinuation rather than to their development.[15] This is the concern that has inspired the debate about 'killer acquisitions'. In Schumpeter's world the 'perennial gale' creatively destroys the current incumbent. Critics of killer acquisitions are worried that what can instead happen is that the incumbent destroys the would-be entrant, thereby smothering the perennial gale; furthermore, competition law may lack the tools necessary to address this phenomenon.

The next section will consider whether there really is a competition law 'gap' that fails to address killer acquisitions and what that gap might consist of; thereafter the theories of harm that such killer acquisitions might give rise to will be examined.

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13 'The Rise and Fall of MySpace' *Financial Times* (4 September 2009) <https://www.ft.com/content/fd9ffd9c-dee5-11de-adff-00144feab49a> accessed 15 October 2022.

14 Nicholas Petit, *Big Tech and the Digital Economy: The Moligopoly Scenario*, (Oxford University Press 2020).

15 Cunningham, Ederer and Ma, (n 2); Amy C Madl, 'Killing Innovation?: Antitrust Implications of Killer Acquisitions', (2020) 38(28) Yale Journal on Regulation.

III. DO KILLER ACQUISITIONS FALL INTO A COMPETITION LAW 'GAP'?

This section will consider whether there is indeed a gap in competition law that results in killer acquisitions escaping proper scrutiny. As is well known, systems of competition law typically consist of three pillars — dealing respectively with anti-competitive agreements, the unilateral abuse of a dominant position or substantial market power, and mergers that are harmful to competition. There are some competition laws that lack the third pillar; for example, Malaysia currently has no system of merger control, although it is likely that this particular gap will be filled in the near future. Similarly, in Hong Kong only mergers in the telecommunications sector are currently subject to competition law scrutiny;[16] in India the merger control provisions of the Competition Act of 2002 were not brought into effect until two years after the sections dealing with agreements and unilateral behaviour.

The essence of the concern about killer acquisitions is that an incumbent firm may acquire potential, or 'nascent', products or competitors with the intention of 'killing' the competitive threat that they represent. Insofar as this is a legitimate concern, merger control is obviously the natural pillar of competition law to address it.[17] There are two concerns. The first is whether there might be a *jurisdictional* gap; do the jurisdictional criteria of merger control capture all the killer acquisitions that would merit investigation? Or, to put the point another way, are there some killer acquisitions that escape scrutiny, but that ought to have been scrutinised? The second concern is whether there might be a *substantive* gap: where jurisdiction to investigate a killer acquisition does exist, are the substantive standards of merger control adequate to address the relevant concerns? More specifically, is it too difficult for a competition authority to demonstrate to the requisite legal standard that a killer acquisition will lead to a 'substantial lessening of competition' or some variant of that standard, depending on the wording of any particular piece of legislation?

A. Is there a jurisdictional gap?

Any system of merger control will contain jurisdictional criteria that determine which mergers fall within the purview of the competition authority. Very often the criteria are based on turnover figures, in particular the turnover of the firm to be acquired. Obvious examples of this are Article 1 of the EU Merger Regulation[18] ('the EUMR'), Section 23(1)(b) of the UK Enterprise Act 2002 and Section 5 of the Indian Competition Act 2002. The basic rule in

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16 'Guideline on the Merger Rule' <www.compcomm.hk/en/legislation_guidance/guidance/merger_rule/merger_rule.html> accessed 26 November 2022.

17 Note however that a strategy of killing by acquisition might also attract the application of rules on the abuse of dominance: see 'Is there a substantive gap?', below.

18 OJ [2004] L 24/1.

the EUMR is that the undertakings concerned in the merger must have a combined worldwide turnover in excess of €5 billion, and that at least two of them must each have turnover of €250 million or more within the EU. Section 23(1)(b) of the Enterprise Act provides that a merger can be investigated where the turnover of the enterprise to be acquired exceeds £70 million. Section 5(a)(i)(A) of the Competition Act applies to mergers where the parties have turnover of more than 3000 crores in India; an alternative provision in Section 5(a)(i)(B) addresses cases where the parties have turnover both outside and within India.

Systems of merger control may also deploy other jurisdictional criteria. For example, in the UK, Section 23(2)(b) of the Enterprise Act, in addition to the turnover thresholds, enables the Competition and Markets Authority ('the CMA') to investigate mergers where the merging enterprises supply or acquire 25% or more of a particular description of goods or services in the UK or a substantial part of it. In some jurisdictions a merger that will 'substantially lessen competition' can be investigated;[19] whilst this approach is understandable in principle, it is difficult to apply in practice, since it begs the very question that a merger investigation is designed to determine. In India, Section 5 of the Act provides jurisdiction for mergers based not only on the turnover of the parties to a transaction but also on the value of assets that they own.

The jurisdictional problem presented by killer acquisitions is that, regardless of the jurisdictional criteria deployed, some cases fall 'below the radar' and thus cannot be investigated. This problem can be easily exemplified in the case of rules based on turnover. In its early years, a start-up company might be designing brilliant new products or developing exciting new technology; however, it may have zero, or negligible, turnover. Even when it begins to commercialise its products, its turnover may remain low, especially for example where it offers services 'free' (in the sense that users do not pay with money for the services they consume) to people on one side of a two- or multi-sided market. In these circumstances, the firm to be acquired may well fall below the turnover thresholds of EU, UK, Indian (or any other) merger control; the transaction may escape scrutiny, in the absence of other jurisdictional bases. This would happen even if it is a paradigm example of an incumbent firm making an acquisition not in order to develop the bright new innovative business but to kill it before it becomes a serious competitive threat.

An obvious example of a transaction that fell below the EUMR's thresholds was Facebook's acquisition of WhatsApp in 2014[20] for $19 billion. The Commission's decision does not reveal the relevant turnover of WhatsApp at the time, since this information is confidential; however, it is understood that

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[19] The Singaporean Competition Act 2004, s 54; The Australian Competition and Consumer Act 2010, s 50; The Portuguese Competition Act 2012, art 41; The Spanish Competition Act 2013, art 10.

[20] Case M 7217 (3 October 2014).

at that time WhatsApp's turnover was actually very low. The Commission's decision does tell us that the transaction did not have an EU dimension since WhatsApp's turnover was below the thresholds of Article 1 of the EUMR. This, therefore, was an example of the type of transaction that might be regarded as a killer acquisition, yet which was not within the EUMR thresholds. On this occasion, the Commission was able to investigate the case, but this was only because the parties volunteered to notify it under Article 4(5) of the EUMR. The mechanisms within the EUMR for the parties and Member States to refer cases to the Commission that otherwise would fall outside its jurisdiction will be explained in Section 5 below. In the event the Commission cleared this transaction unconditionally; although in retrospect some commentators have argued that this was precisely the kind of case that required stricter supervision because of the ability of digital platforms to extend their market power by eliminating potential competition.[21]

As far as India is concerned, there have been numerous acquisitions in recent years of innovative start-up firms that might have been regarded as killer acquisitions; however, since they fell below the jurisdictional thresholds of the Competition Act, they were not investigated by the Competition Commission of India.[22] Examples that are in the public domain include the acquisition of Uber Eats by Zomato in the food delivery aggregator business; in the taxi aggregator space Ola Cabs' acquisition of Taxi For Sure; and, in the Ed-tech sector, several acquisitions of nascent companies by Byju's. Further examples are the acquisition by the e-commerce giant Flipkart of Myntra and the acquisition by Snapdeal of Free charge. The consequence of these cases falling below the thresholds of the Competition Act is that there has yet to be a case in India in which a 'killer acquisition' has been investigated.

In Section 5, we will examine ways of plugging the 'jurisdictional gap' that may exist in relation to killer acquisitions.

B. Is there a substantive gap?

Persons concerned about killer acquisitions not only question whether there is a jurisdictional gap; but a separate issue is whether there might also be a gap in the substantive standards of merger control. In essence, systems of merger control ask whether a merger will be harmful to competition. Different linguistic formulations can be found from legal system to legal system, but ultimately the question is whether a market will suffer serious competitive harm as a result of a merger. Article 2 of the EUMR asks whether a merger will

[21] See s 4 below 'Has there been under-enforcement of competition law in killer acquisition cases?'.

[22] Sankar and Vijayaumaran, 'Putting a Knot on Killer Acquisitions in India: Lessons from EU New Merger Control Policy, 2021' (*Jurist*, 27 August 2021) <www.jurist.org/commentary/2021/08/vijayakumaran-sankar-merger-control> accessed 15 October 2022.

'significantly impede effective competition'; Section 35 of the UK's Enterprise Act considers whether the merger could "substantially lessen competition"; Section 5 of the Indian Competition Act is concerned to establish whether a merger would cause "an appreciable adverse effect on competition". It will be for the competition authority to determine whether the relevant test is satisfied, and the decision will have to supported by persuasive evidence. Where the authority fails to demonstrate to the required standard of proof that the merger will be harmful to competition, its decision may be overturned on appeal. For example, six of the European Commission's merger decisions have been annulled on appeal to the General Court, *Airtours/First Choice,*[23] *Schneider Electric/Legrand,*[24] *Tetra Laval/Sidel,*[25] *MCI WorldCom/Sprint,*[26] *UPS/TNT Express,*[27] and *Hutchison 3G UK/Telefónica UK.*[28] Merger control, by its very nature, is speculative; a competition authority has to decide whether competition will be harmed in the future if the merger is allowed to proceed. The authority must identify a theory or theories of harm,[29] and compare how the market will function in a post-merger future with an appropriate 'counterfactual' world, in which no merger has taken place. In looking to the future, competition authorities can and do look at potential competition, as well as competition that already exists.[30] However, in the case of killer acquisitions, it is particularly difficult to assess whether a start-up firm is a sufficiently plausible potential competitor for the purposes of competition law analysis; there is a big difference between persuading investors and capital markets that a young firm is worth investing in on the one hand, and prohibiting a merger on the basis that that firm is a potential competitor that should not be removed from the market on the other. The substantive tests of EU, UK and Indian merger

23 Case M 1524 *Airtours/First Choice* (22 September 1999); OJ [2000] L 93/1, annulled on appeal Case T-342/99 *Airtours v Commission* EU: T:2002:416.

24 Case M 2283 (10 October 2001), annulled on appeal Case T-310/01 *Schneider Electric v Commission* EU: T:2002:254 (annulment of prohibition decision); Case T-77/02 *Schneider Electric v Commission* EU: T:2002:255 (annulment of divestiture decision).

25 Case M 2416, (30 October 2001), annulled on appeal Case T-5/02 *Tetra Laval v Commission* EU:T:2002:264 (annulment of prohibition decision); Case T-80/02 *Tetra Laval v Commission* EU:T:2002:265 (annulment of divestiture decision), Case C-12/03 P *Commission v Tetra Laval* EU:C:2005:87 (appeal seeking annulment of the General Court's prohibition decision); the Commission appealed unsuccessfully to the Court of Justice; Case C-13/03 P *Commission v Tetra Laval* EU:C:2005:88 (appeal seeking annulment of the General Court's divestiture decision).

26 Case M 1741, (28 June 2000), annulled on appeal Case T-310/00 *MCI Inc v Commission* EU: T:2004:275.

27 Case M 6570, (30 January 2013), annulled on appeal Case T-194/13 *UPS v Commission* EU: T:2017:144.

28 Case M 7612, (11 May 2016), annulled on appeal Case T-399/16 *CK Telecoms UK Investments Ltd v Commission* EU: T:2020:217.

29 For a useful discussion of theories of harm in cases on killer acquisitions, see *Start-ups, Killer Acquisitions and Merger Control* (n 3); Lear, 'Ex-post Assessment of Merger Control Decisions in Digital Markets, Final Report, Prepared for the CMA' (May 2019) <www.gov.uk/cma> accessed 15 October 2022.

30 European Commission, *Guidelines on the Assessment of Horizontal Mergers* (2004); UK CMA, *Merger Assessment Guidelines* (2010).

control do not merely ask whether a merger would harm competition; rather the competitive harm must be 'significant' or 'substantial' or 'appreciable', and the competition authority must demonstrate this to be the case to the appropriate legal standard and to the satisfaction of any court that might subsequently review its decision. Predicting that a particular start-up firm is a potential competitor that might topple one of the AAMAM giants is highly speculative and may, quite simply, be too speculative for the purposes of merger control. The question of whether there is a 'substantive gap' in the substantive law applicable to killer acquisitions, and how it might be filled, will be considered in Section 5. In particular, some commentators argue that a different standard of review may be needed to assess killer acquisitions, and that the burden of proof might be altered, or even reversed, in order to allow a more sceptical approach to be taken to this phenomenon.

There is a further interesting point about the control of killer acquisitions that merits a brief diversion. As we have seen, such acquisitions might escape scrutiny under merger control either because a country has no rules on the topic, such as Malaysia, or because the jurisdictional criteria of the law are inapplicable. However, an alternative possibility exists: that the acquisition might violate the relevant rule applicable to the unilateral behaviour of a dominant firm. In the early years of EU competition law, there was no specific instrument providing for merger control: the EUMR did not come into effect until 1990. However, Articles 101 and 102 have been enforceable by the European Commission since 1962, and in *Continental Can v Commission*[31] the Commission prohibited, as an abuse of a dominant position contrary to Article 102, an acquisition by Continental Can that would eliminate its main competitor from the market and significantly impede effective competition. Although the Commission's decision was annulled on appeal by the Court of Justice (because the Commission had failed to define the relevant market in respect to which it found Continental Can to be dominant), the Court accepted that, in principle, such an acquisition could be abusive. In practice, since the entry into force of the EUMR, the Commission has never used Article 102 as an instrument of merger control. Furthermore, Article 21(1) of the EUMR specifically says that the EUMR alone applies to mergers, meaning that the Commission does not have powers under Regulation 1/2003 to apply Article 102 in such cases. However, this does not mean, in itself, that Article 102 does not apply to mergers. A case has recently been referred to the Court of Justice in Luxembourg by the Courd'appel de Paris, *Towercast v Autorité de la Concurrence,*[32] raising this very issue. Specifically, the Paris court asks whether a national competition authority could apply Article 102 to a merger that falls below the jurisdictional criteria of French merger control and that has not been referred to the European Commission under Article 22 of the EUMR (a procedure that will be explained in Section 5 below). This question is of

[31] Case C-6/72 EU:C: 1973:22.

[32] Case C-449/21, not yet decided.

great significance to the killer acquisition debate, since it opens up the possibility of reviewing such cases under abuse law even when merger control is inapplicable. Might it be the case that Section 4 of the Indian Competition Act is applicable to such an acquisition?[33]

IV. HAS THERE BEEN UNDER-ENFORCEMENT OF COMPETITION LAW IN KILLER ACQUISITION CASES?

Concerns about the phenomenon of killer acquisitions were first expressed by commentators on the pharmaceutical industry, worried that pharmaceutical companies were acquiring products early in their life cycle with the intention of terminating them or preventing their development. However, as digital platforms began to multiply and expand exponentially, attention turned to this sector as well. In particular it was noticed that AAMAM regularly acquired start-up firms. A report prepared for the CMA in the UK by an economics consultancy, Lear, found that between 2008 and 2018 Alphabet had acquired 168 companies, Meta 71, and Amazon 60.[34] This, no doubt, was very good news for the start-ups themselves, as they received rich rewards for their innovation and enterprise; it is important that competition law should not unduly hamper this possibility, which is a natural feature of the market. On the other hand, it seemed reasonable to question whether these acquisitions might not also be inspired by a desire to prevent the emergence of credible competitors. Competition authorities did review some of AAMAM's acquisitions, as well as numerous other cases involving digital platforms. As unease grew generally about the ever-increasing power of certain platforms, some commentators became concerned that killer acquisitions in the digital economy were escaping proper scrutiny, either because of a jurisdictional or a substantive gap. The reports referred to earlier in this article prepared by Crémer, de Montjoye and Schweitzer for the European Commission and by Furman for the UK Government[35] noted this problem, as did many others. Of particular interest were the *Lear Report*, produced for the CMA in the UK, and the OECD Roundtable discussion in 2020.

The *Lear Report* addresses three tasks established by the CMA. First, to analyse decisions by competition authorities in the digital sector, the theories of harm that had been identified in those cases and to identify the economic features that should be taken into account when conducting merger control. Secondly, Lear was asked to analyse cases that had been looked at in the UK and to evaluate whether the CMA (or its predecessor, the Office of Fair

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33 Note that in the US the Federal Trade Commission has initiated proceedings against Facebook accusing it of illegally maintaining its monopoly in personal social networking through a systematic policy of acquiring aspiring entrants to its market; the case can be followed at <www.ftc.gov>.

34 Lear (n 29).

35 *Competition Policy for the Digital Era* (n 7) and *Unlocking digital Competition* (n 8).

Trading (the 'OFT')) had come to a reasonable conclusion on the evidence available. The third task was to consider, on the basis of the evolution of the market after any particular case, whether it transpired that there had been a detrimental outcome for competition. The *Lear Report* described the particular features of digital platform markets that create challenges for competition policy, including the prevalence of network effects, the multi-sidedness of markets and the accumulation of big data. It noted the various theories of harm that had been examined in the cases of the previous decade, both horizontal and vertical. It then asked, in Section 1.5 of the *Report*, what 'general lessons' could be learned. To state the *Lear Report's* conclusion first, it advises at page 45 that: "The characteristics of digital markets, and the shape that competition takes within them, may justify a more risk-taking approach".

At Paragraph 1.148, the *Lear Report* says that there is a concern that merger policy has been too concerned about the incorrect intervention (a 'type I error') as opposed to incorrect clearance ('type II error'): it considers that the particular features of digital markets may justify a change in the usual 'trade-off' between these errors. It considered that incumbent firms may have stronger incentives to acquire start-ups than, for instance, venture capitalists: it notes that Amazon, Meta and Alphabet had deployed considerable resources in this respect. The *Report* notes the complexity of establishing a counter factual in the case of the acquisition of start-up firms which, absent the acquisition, might have developed in various different ways. When endeavouring to assess the prospects of a start-up, *Lear* suggested that there might be circumstances in which it would be appropriate for a competition authority to conduct a dawn raid in order to find documents that indicate the future plans of that firm; on this point it should be noted in passing that competition authorities for sometime have been asking for more internal documents from companies when investigating mergers in order better to understand how firms themselves envision the future. The *Report* considered that the price paid for an acquisition is, in itself, relevant to the question of whether it should be investigated and how intensively. In terms of the CMA's substantive analysis in merger cases, the *Lear Report* was concerned that it may have misanalysed the market on some occasions, an example being *Facebook/Instagram*, discussed below. The *Report* suggested that it might be appropriate in the case of digital mergers to look longer into the future than two years, which is often the time period used: the reason for this is that it can take a considerable time for an innovative digital start-up to become established, an example being Snapchat which was established in 2011 and was still operating at a loss in 2018: it is now a significant presence in the market. *Lear* considered that competition authorities had tended to be rather conservative in their analysis of digital cases, in particular as to the evaluation of potential competition, and suggested that they should be less so in the future; to put the point another way, they should be more speculative as to the future and more imaginative in their choice of counter factuals. The *Report* recognised the risks that this entails, but considered that competition authorities ought to test the boundaries of the legal tests and constraints that they face.

The *OECD paper* covers similar terrain to the *Lear Report*. It notes that competition authorities have started to look at the acquisition of start-up or nascent firms more closely in recent years. Section 2 of the *OECD Paper* examines various theories of harm that may be relevant in such cases; section 3 considers whether there might be a jurisdictional gap in systems of merger control and whether sufficient flexibility exists in the current law to address such a gap. Section 4 deals with the question of how best to analyse the acquisition of start-up firms and section 5 suggests possible policy responses. Section 6 of the *OECD Paper* concludes that the elimination of nascent competition is a serious issue: "Ensuring that acquisitions of nascent firms are investigated rigorously, and blocked where necessary, should therefore be high amongst agencies' priorities".

The *OECD Paper* contains a number of proposals. First, that competition authorities should look to ensure that killer acquisitions are not escaping scrutiny as a result of the jurisdictional rules of their systems; consideration should be given to devising ways to examine such cases if they are currently not covered. Secondly, and consistently with *Lear*, competition authorities should be more imaginative in selecting appropriate counter factuals in digital cases, and should not default to caution or inaction when the evidence is uncertain. The *Paper* specifically says that a more sceptical approach might lead to the annulment of decisions by courts on appeal; it suggests that a competition authority should not see such losses as a source of shame, but rather as an endorsement of its approach in trying to identify which mergers are permissible and which are not. Thirdly, the *OECD Paper* proposes that a 'balance of probabilities' test might be introduced as the substantive standard for reviewing digital mergers: this will be explained in section 6 below. Section 6 will also consider the *Paper's* final proposal, which is that the burden of proof might be reversed in certain cases, thereby making intervention easier on the part of a competition authority.

A. Possible examples of under-enforcement

It will be recalled that the CMA asked Lear to look at the enforcement record of it and its predecessor, the OFT, in relation to digital mergers; in particular Part II of the *Lear Report* looked at the investigations of *Facebook/ Instagram,*[36] *Motorola Mobility Holding (Google Inc)/Waze Mobile Ltd,*[37]

[36] OFT decision of 14 August 2012 <www.assets.publishing.service.gov.uk/media> accessed 15 October 2022.

[37] OFT decision of 11 November 2013, <www.assets.publishing.service.gov.uk/media> accessed 15 October 2022.

Priceline.com/Kayak Software Corporation,[38] *Expedia Inc/Trivago GmbH*[39] and *Amazon/The Book Depository.*[40] *Lear* considered that both *Facebook/Instagram* and *Google/Waze* may have represented examples of under-enforcement on the part of the UK competition authorities. It is interesting to note that neither of these transactions was notifiable to the European Commission under the EUMR: indeed, Instagram at the relevant time had no turnover at all. Both transactions fell within the OFT's jurisdiction because there was an increase in the parties' share of supply; the turnover rules in UK law were not triggered.

Facebook acquired Instagram for US$ 715 million in 2012. The competition authorities that analysed this transaction considered that Facebook was a social network service provider and that Instagram was a photo-sharing app; they concluded therefore that they were not horizontal competitors in the same market. In the UK the OFT cleared the merger at Stage 1 of the merger review process. The OFT considered whether Instagram could become a social network provider and decided that this was not the case: this was too speculative; the OFT did not consider that Instagram would be able significantly to monetise its services. The *Lear Report* identified a number of issues of possible concern in the OFT's analysis. It found that the authority underestimated the advertising potential of Instagram's app, and may have placed excessive weight on the functionality of the services offered by the parties' products for users on the other side of the market. To put this point another way, the OFT may have been too focussed on whether a social messaging service was a competitor of a photo app, whereas it should have been looking at both sides of this two-sided market and asking whether Instagram would be able to monetise the number of users using its site.[41] In Australia, the ACCC's *Digital Platform Inquiry* considered that, by acquiring Instagram, Facebook eliminated a potential competitor.[42] Its report notes that post-acquisition Instagram became "a broader social media platform, with the ability for users to share information and photos, to message other users, and to now sell advertising inventory". The *ACCC Inquiry* argues that at the time of the merger, Instagram could have been perceived as having "at least the potential to develop into an effective competitor". It will be recalled that the European Commission subsequently cleared Facebook's acquisition of WhatsApp on 3 October 2014.[43] Later on, the Bundeskartellamt in Germany concluded that Facebook had abused a dominant position under German competition law by imposing unfair terms

38 OFT decision of 14 May 2013, <www.assets.publishing.service.gov.uk/media> accessed 15 October 2022.

39 OFT decision of 7 March 2013, <www.assets.publishing.service.gov.uk/media> accessed 15 October 2022.

40 OFT decision of 26 October 2011, <www.assets.publishing.service.gov.uk/media> accessed 15 October 2022.

41 *Lear Report* (n 29) 51-71; see also see *Furman* review, para 3.85, p 98.

42 See *ACCC Digital Platforms Inquiry*, p 80, 2.4.4 "Facebook's strategic acquisitions" <https://www.accc.gov.au> accessed 15 October 2022.

43 Case M 7217 (n 20).

and conditions on German users of its services, who had not freely consented to the monetisation of their use of Facebook, WhatsApp and Instagram.[44] Furthermore, the Federal Trade Commission in the US is accusing Facebook of illegal monopolisation of social networking by systematically acquiring would-be entrants to the market:[45] the FTC is seeking the divestment of both Instagram and WhatsApp by Facebook. It is obviously possible to speculate that these two cases have arisen because more sceptical action was not taken by competition authorities at the time of the two acquisitions.

Just as *Facebook/Instagram* may have been a missed opportunity for the OFT, Lear also wondered if the same was true of *Google/Waze.*[46] Google operated an Internet search engine offered for free to its users and sold advertising space on its websites and on partner websites; it also offered Google Maps, a free application providing mapping and navigational services that could also be used by third parties on their own apps. Waze provided another map application that was available only for mobile devices. As in the case of *Facebook/Instagram*, Lear considered that the OFT had failed to consider the full range of counter factuals available in this case, and in particular the potential for Waze to monetise its services through advertising.

B. Examples of enforcement

It would be incorrect to give the impression that the competition authorities in the UK have systematically failed to take action against the type of acquisition with which this article is concerned. Indeed, it would be reasonable to say that in recent years the CMA has taken a noticeably more sceptical approach to acquisitions of novel technology and nascent competitors. For example, in *Illumina Inc/Pacific Biosciences of California Inc.* Illumina, a leading biotechnology firm active in sequencing technology, sought to acquire Pacific Biosciences (PacBio), which reportedly had a current market share in the region of 2 to 3%. On January 2, 2020 the parties announced that they had agreed to terminate their merger agreement, following intervention both in the US and the UK. In the UK the CMA, having analysed internal documents and customer feedback, provisionally concluded that the parties saw each other as a considerable threat, that there was some substitutability between their products and that competition between the parties would increase in the future due to PacBio's advancements; it also considered that other small players in

44 Decision of 7 February 2019, <www.bundeskartellamt.de> accessed 26 November 2022; This case is currently on appeal in Germany, where the German court has referred certain questions to the European Court of Justice on the interplay between the use of competition law and the EU General Data Privacy Regulation: see Case C-252/21 *Facebook v Bundeskartellamt*, not yet decided.

45 (n 33).

46 *Lear Report* (n 29) 72-86.

the sector would not exert a competitive constraint on the merged entity.[47] The transaction was abandoned before the CMA reached its final conclusion. In *Sabre/Farelogix*[48] the CMA prohibited a transaction that it considered prevented the development of a particular type of software, not by the firm to be acquired, Farelogix, but by Sabre itself: a case such as this can be regarded as an example of a 'reverse killer acquisition'. An interesting feature of this case was that the CMA's jurisdiction over the transaction was not based on turnover (Farelogix did not have £70 million turnover in the UK) but on the 'share of supply' test described above.[49] Sabre's challenge to this assertion of jurisdiction was unsuccessful when the case reached the Competition Appeal Tribunal.[50]

A particularly interesting case is that of *Facebook/GIPHY*.[51] The CMA prohibited the merger between Facebook and Giphy, which had already been consummated: Facebook (now Meta) has been ordered to sell Giphy to an approved purchaser. We are all familiar with the GIFs of Giphy. The CMA had two sets of concerns. The first were vertical: that a merged Facebook/Giphy could deny access to GIFs to other social platforms, and that this would drive even more traffic to Facebook, WhatsApp and Instagram, which already account for about 73% of time spent on social media in the UK; the merged entity would also be able to change the terms of access by other platforms in order to extract more data from them. The second concern, of direct relevance to this article, was that the acquisition of Giphy eliminated it as a potential competitor in display advertising services. Facebook/Meta vehemently disagreed with the CMA's analysis in this case and lodged an appeal atthe Competition Appeal Tribunal. The CMA's decision was substantially upheld on 14 June 2022, except that the CAT considered that the CMA had made one procedural error; in 18 October the CMA adopted a second decision, confirming the finding of an SLC and requiring the divestiture of GIPHY by Facebook.

V. LEGISLATIVE RESPONSES TO THE PHENOMENON OF KILLER ACQUISITIONS

The debate on killer acquisitions continues. What began as a specific concern about some transactions in the pharmaceutical sector has broadened, and a huge amount of intellectual capital has been expended on trying to understand precisely the nature of the problem, if it exists, and to find practical

47 'Summary of provisional findings' (24 October 2019) <www.gov.uk> accessed 15 October 2022.

48 CMA decision of 9 April 2020.

49 See 'Is there a Jurisdictional Gap', above.

50 Case 1345/4/12/20 *Sabre Corpn v CMA*, [2021] CAT 11, <www.catribunal.org.uk> accessed 15 October 2022.

51 CMA decision of 30 November 2021, substantially upheld on appeal Case 1429/4/12/21 *Meta Platforms Inc v CMA*, [2022] CAT 26.

solutions to it. Governments worldwide are addressing the concerns raised by digital platforms generally (for example privacy, fake news, online harm, terrorism, money-laundering) and competition issues specifically. As far as the issue of killer acquisitions is concerned, we have seen that there are two questions: whether there is a jurisdictional gap, and whether a change in substantive analysis is required.

A. Jurisdiction

The jurisdictional problem arises from the use of turnover thresholds as a jurisdictional criterion. The attraction of turnover thresholds is that they provide a fairly easy 'bright-line' rule that gives a high degree of certainty as to which transactions are subject to review. Selecting the most appropriate thresholds is a fairly complex matter: they should not be set so low that they capture too many transactions, with the associated regulatory imposition that that entails; but they should also not be so high that the system becomes unduly permissive. Furthermore, the thresholds should be set in such a way that they capture only transactions that might plausibly have some competitive impact within the state whose law would be applicable: hence, there needs to be a sensible 'jurisdictional nexus'. However, assuming that any particular merger control law contains clear turnover rules, they are fairly easy to apply in practice. As explained in Section 3 of this article, the difficulty that arises in the case of killer acquisitions is that turnover thresholds may well fail to apply to enterprising start-ups due to their non-existent or low turnover.

One solution to this problem could be to introduce complementary thresholds; a threshold that has an intuitive appeal is one based on the value of the transaction in question.[52] This jurisdictional criterion would exist alongside existing turnover thresholds, and would enable a high value/low turnover transaction to be investigated. There would of course be a debate as to what the relevant value threshold should be, but it is inevitable that a transaction such as *Facebook/WhatsApp*, where Facebook paid €19 billion for WhatsApp, would have been subject to investigation in a system based on value.

The European Commission has considered whether there might be a case for the introduction of a threshold based on value, and this is discussed in its *Evaluation of procedural and jurisdictional aspects of EU merger control.*[53] The paper noted the risk that this would create an additional administrative burden, which would be resource-intensive and may place unnecessary burdens on businesses; the *Crémer Report* had noted the same problem.[54] The *Stigler*

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52 Bourreau and de Streel, 'Digital Conglomerates and EU Competition Policy' (2019) SSRN.

53 'Commission Staff Working Document Evaluation of Procedural and Jurisdictional Aspects of EU Merger Control' (SWD (2021) 66 final).

54 *Ibid* 113-114.

report[55] also noted the potential use of transaction value thresholds, specifically for the review of mergers of digital platforms and start-ups. However value thresholds are not without their difficulties, as can be seen from the *Crémer Report* and the *OECD Paper* that has been referred to at various points in this article; not least of these difficulties is to devise a jurisdictional nexus between the value of a transaction and any particular state's law; a high-value transaction might fall within the jurisdiction of any number of merger control laws, and therefore be notifiable multiple times, even though it would be unlikely to have any effect in many jurisdictions. Suffice it to say that the EU has not proposed to introduce a threshold based on value; instead, the referral provisions of the EUMR contained in Articles 4 and 22 of the EUMR have been deployed to capture possible cases of killer acquisitions (see below).

Some countries have changed their thresholds to provide for jurisdiction on the basis of transaction value. In Germany, section 35(1) of the Act Against Restraints of Competition 1957 (as amended) contains a conventional jurisdictional rule based on turnover: the combined turnover of the parties to a merger must exceed €500 million, and the parties must have more than a specified amount of domestic turnover as well. In 2017, a further jurisdictional threshold was introduced; under the new Section 35(1)(a), the parties must exceed the turnover thresholds in Section 35(1). Furthermore, the value of a transaction must exceed €400 million, and the target of the acquisition must have 'substantial operations' in Germany. A similar rule was introduced in Austria.[56] The Bundeskartellamt has produced *Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification.*[57] An article by Sauermann of the Bundeskartellamt has suggested that the new threshold has not led to a significant increase in notifications, and it appears that there has yet to be intervention against what might be described as a killer acquisition.

There are at the moment no proposals to introduce a value-based jurisdictional rule into the EUMR. As noted above, consideration has been given to this possibility, but for the time being no action will be taken. This is because an alternative basis for the European Commission to review killer acquisitions exists in the 'referral system' that the EUMR contains. The basic jurisdictional rule on the allocation of merger control within the EU is that mergers above certain thresholds are investigated by the Commission, and that mergers below those thresholds are scrutinised, if at all, by the national competition authorities ('the NCAs') of the Member States. National laws contain their own jurisdictional rules. The principle of the 'one-stop shop' provides business, the

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55 *Stigler Committee on Digital Platforms* (n 9).

56 The Austrian Cartel Act, s 9(4), as amended by the Austrian Cartel and Competition Law Amendment Act 2017.

57 'Bundeskartellamt' (July 2018) <www.bundeskartellamt.de/SharedDocs> accessed 26 November 2022.

Commission and the NCAs with legal certainty. In practice the system works well, and has done since 1990.[58]

Two exceptions to the principle of the one-stop shop exist. Firstly, Article 4 of the EUMR enables the parties to a merger to ask for a merger below the thresholds of the EUMR to be referred to the Commission, or for a merger above the thresholds to be referred to a Member State (or Member States).[59] Article 9 of the EUMR enables a Member State to request that a merger having an EU dimension be referred to it, and Article 22 allows a Member State or Member States to refer a merger that is below the EU thresholds to be referred to the Commission. Article 22 was inserted into the original EUMR that was adopted in 1989 because some Member States did not have a system of merger control; Article 22 meant that mergers that gave rise to competition concerns could be looked at (subject to the requirements of Article 22) by the Commission, even where there was no domestic system of merger control. Subsequently all of the Member States of the EU, with the exception of Luxembourg, have their own systems of merger control. Nevertheless, Article 22 referrals are not infrequent, in particular where a merger might be subject to several domestic notifications, but it is more efficient for the case to be dealt with in one investigation by the Commission.

The debate about killer acquisitions has breathed fresh life into Article 22. Some transactions may fall below the thresholds of the EUMR, but nevertheless be subject to scrutiny under domestic law; it is uncontroversial that such cases can be referred to the Commission under Article 22. However, the very point about a killer acquisition is that, because of the non-existent, or low, turnover of a target start-up, it might fall below even the lower thresholds of domestic law. The question that then arises under Article 22 of the EUMR is whether a Member State can refer a merger to the Commission even in circumstances where that State has no jurisdiction over the case in question. For many years, the Commission had a practice of not taking jurisdiction in such circumstances, but in its communication of 31 March 2021 *Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases*[60] it indicated a change in its practice. In this guidance the Commission notes the concern that some transactions may escape merger control scrutiny because of the low turnover of the target company, and that this may be a particular concern in the digital and pharmaceutical sectors.[61] The Commission says that, as a result, it will, in certain circumstances, 'encourage and accept referrals' from a Member State where

58 Richard Whish and David Bailey, *Competition Law* (10th edn, 2021, OUP) 888-900.

59 As noted above, the transaction in *Facebook/WhatsApp*, which fell below the thresholds of the EUMR, was referred by the parties to the Commission under Article 4(5); the merger was cleared unconditionally by the Commission, so that this turned out to be a wise move by the merging parties.

60 OJ [2021] C 113/1.

61 *Ibid* para 10.

the Member State does not have initial jurisdiction over the case. Section 2 of the *Guidance* sets out "Guiding principles for the referral of cases which are not notifiable under the laws of the referring Member State(s)" and Section 3 explains the procedural aspects of such cases.

The fact that a Member State has the possibility of making a reference to the Commission even in circumstances where it lacks jurisdiction over a transaction under its own law reduces the pressure on it to introduce a domestic amendment: the French Autorité de la Concurrence indicated in 2020 that it is prepared to make references to the Commission under Article 22 when it lacks jurisdiction under its own rules on merger control.[62]

The Article 22 procedure had been used in 2018 to refer a digital case to the Commission in *Apple/Shazam,*[63] where Austria, France, Iceland, Italy, Norway and Spain jointly made a request to the Commission to take the case. In that case each country had jurisdiction to investigate the merger under its own law. However, in *Illumina/GRAIL*, the Commission accepted a referral from France, Belgium, Greece, Ireland, the Netherlands, and Norway where some Member States had no jurisdiction over the case.[64] This was not a digital merger, but rather concerned the acquisition by Illumina of GRAIL which was developing cancer detection tests based on 'next generation sequencing' systems for genetic and genomic analysis. The Commission opened a phase II in-depth investigation of this case in July 2021, concerned that the merged entity would engage in a vertical foreclosure strategy as Illumina had a leading position in next generation sequencing systems. Illumina appealed against the Commission's assumption of jurisdiction in the General Court in Luxembourg, complaining that Article 22 was improperly used; the appeal was unsuccessful.[65] The case of *Facebook (Meta)/Kustomer*[66] was referred by ten Member States to the Commission under Article 22.

In the UK, it will be recalled that there are two jurisdictional rules, one based on turnover and the other on whether a transaction would increase the parties' 'share of supply'. It is noticeable that several cases involving digital markets have seen the CMA assert jurisdiction not on the basis of turnover but rather on the share of supply test; examples are *Amazon/The Book Depository*,

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62 *2020 Merger Control Guidelines of the Autorité de la Concurrence*, (23 July 2020) para 341, <www.autoritedelaconcurrence.fr> accessed 26 November 2022.

63 Case M.8788, Commission decision of 6 September 2018, <www.ec.europa.eu> accessed 26 November 2022.

64 Case M.10188 *Illumina v Grail*.

65 Case T-227/21 *Illumina Inc v Commission*, EU: T:2022:447.

66 Case M.10262, Commission decision of 27 January 2022, <www.ec.europa.eu> accessed 15 October 2022.

Facebook/Instagram, *Motorola Mobility Holding* (*Google Inc)/Waze*, and *Priceline/Kayak.*[67]

The discussion of killer acquisitions and merger control has so far been concerned with the jurisdictional rules applicable to the economy at large. However, as the wider debate about the appropriate way to address the power of digital platforms has developed, and as proposals for sector-specific *ex ante* regulation have progressed, consideration has been given to whether bespoke rules should be introduced for mergers in this sector. In the EU, the Digital Markets Act, which entered into force on 1 November 2022, requires, in Article 14, that a designated 'gatekeeper' would have to inform the Commission of any planned merger, irrespective of whether it is notifiable to the Commission or an NCA under applicable merger control rules; the Commission would be obliged to inform the NCAs of any such notification, and an NCA would be allowed to use that information to request the Commission to investigate a merger under Article 22 of EUMR.[68] However, the DMA does not provide the Commission with any wider powers to investigate such mergers than it has under the EUMR, nor does it alter the substantive test for their analysis; Article 14 obligation is merely informational.

The DMA differs from what is in contemplation in the UK. There a Task Force working under the aegis of the CMA, building on the work contained in the *Furman Review*, has recommended that a new pro-competition regime should be introduced for digital markets.[69] The system would have three pillars: a legally binding code of conduct, tailored for each firm in the digital space that has 'strategic market status'; any interventions by the Digital Markets Unit ('the DMU'), to be housed within the CMA, would be intended to promote competition; and new merger rules would be adopted that would enable closer scrutiny by the DMU of digital mergers than is currently the case under the Enterprise Act: the new merger rules would deal both with jurisdictional issues and substance. The CMA's advice has been adopted by the UK Government in its policy proposal of July 2021, *A new pro-competition regime for digital markets.*[70] Part 7 of this proposal deals with mergers.

The Government intends that there will be a bespoke merger regime, administered by the CMA, for firms designated as having strategic market status ('SMS'). As to the jurisdictional issues, the Government has two proposals. The first is that a new reporting requirement would be imposed on firms

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[67] OFT decision of 14 August 2012 n (36); OFT decision of 11 November 2013 (n 37); OFT decision of 14 May 2013 (n 38); OFT decision of 7 March 2013 (n 39), OFT decision of 26 October 2011 (n 40).

[68] The DMA is available at <www.eur-lex.europa.eu/legal-content>.

[69] CMA Report, 'A New Pro-Competition Regime for Digital Markets – Advice of the Digital Markets Task Force' (2020) <www.assets.publishing.service.gov.uk> accessed 15 October 2022.

[70] CP 489, <wwwgov.uk/government/consultations> accessed 15 October 2022.

designated with SMS, to inform the CMA of all mergers. Historically, the largest digital firms have tended not to inform the CMA of forthcoming transactions (notification of mergers in the UK is voluntary rather than mandatory). This creates a burden on the CMA which has to proactively seek information relating to these mergers. The Government says that it is minded to introduce an 'advance notice' reporting requirement relating to all imminent merger activity by firms with SMS; firms with SMS would have to send a report to the CMA before the completion of a transaction. This would give the CMA a short time to determine whether to investigate the transaction before it completes. This system does not amount to mandatory pre-notification: it is simply informational, and would involve the provision of a minimal amount of information.

The second Government proposal is that a broader and clearer jurisdiction should be established for the CMA to review SMS mergers, through the introduction of a transaction value threshold and an accompanying UK nexus test. This is seen to be necessary because, even with a share of supply test, some mergers are not caught by the current thresholds, in particular cases where the concerns might be vertical or conglomerate. By its nature, the share of supply test, which asks whether there will be an increment in the share of supply, applies only to horizontal cases.

A third possibility that the Government contemplates is that it might make a subset of the largest transactions by firms with SMS subject to mandatory pre-notification; however, this proposal appears to be somewhat tentative, and it remains to be seen whether the Government proceeds with it when it formulates its final proposals.

In India, the Competition Law Review Committee reported to the Ministry of Corporate Affairs in July 2019 on possible changes to both the substantive and procedural aspects of Indian competition law in order to make the system more robust.[71] Part 5 of the Committee's Report contains a very useful discussion of the merits (and drawbacks) of introducing a value-based threshold for mergers. Having reviewed the position in various jurisdictions, including the position in the EU, UK, Germany and Austria described in this article, the Committee concluded that there was an enforcement gap in Indian merger control law, and that any amendment to the law should make provision for scrutiny of mergers on the basis of value. Paragraph 5.13 of the Report noted a number of specific issues that a value-based rule would need to address (such as how to account for fluctuations in the value of shares where they form part of a transaction and how to frame an appropriate jurisdictional nexus to India). However, it recommended that a future Competition Act should contain an enabling provision empowering the Government to introduce a jurisdictional rule based on the value of a deal. The Competition (Amendment) Bill 2020

[71] Report Of the Competition Law Review Committee (2019) <www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf> accessed 26 November 2022.

currently under consideration in India proposes amendments to section 5 of the Competition Act, 2002. Point 6 of the Bill adds two provisos to Section 5 of the 2002 Act, which are as follows:

> Provided that the Central Government may in public interest and in consultation with the Commission prescribe any criteria other than those prescribed in clauses (a), (b) and (c), the fulfilment of which shall cause any acquisition of control, shares, voting rights or assets, merger or amalgamation to be deemed to be a combination under this section and a notice for any acquisition of control, shares, voting rights or assets, merger or amalgamation fulfilling such criteria shall be given to the Commission under section 6.

B. Substance

Section 3 of this article examined whether there might be a substantive gap in merger control when it comes to the review of killer acquisitions. The *Furman Review* examined this question, not only in relation to killer acquisitions specifically, not to digital mergers generally. It considered that there were reasons to doubt that the conventional ‘Substantial Lessening of Competition’ (‘SLC’) test, which the CMA has to apply on the basis of a balance of probabilities, was fit for purpose when applied to firms with commanding power in digital markets. It therefore proposed altering both the substantive test and the location of the burden of proof for some cases.

In *A New Pro-Competition Regime for Digital Markets*, the UK Government has proposed changing the threshold at which the CMA can intervene in a merger, by amending the balance of probabilities threshold used in Phase 2 investigation. The Government acknowledges the difficulties for the CMA when applying the SLC test to digital mergers, where markets can move quickly and less predictably than other markets. This problem– of potentially large but also uncertain harm– may be particularly acute for mergers involving firms with SMS because of the size and importance of the activities these firms are engaged in, their existing entrenched market power and the high number of young, early-stage businesses they acquire. It can be difficult for the CMA to prove that it is ‘more likely than not’ (the current probability threshold used for the second phase in-depth review) that harm could arise, and so affects its ability to intervene in mergers involving firms with SMS; this may mean that some mergers have been cleared under the current regime despite being potentially harmful to competition.

The *Furman Review* recommended that a change should be made to legislation to allow the CMA to use a ‘balance of harms’ approach in merger cases. This would take into account the scale of potential harm, in addition to the likelihood of harm occurring. However, the CMA's Task force did not pick up this idea, instead proposing that the existing SLC test used in UK merger control should be retained but lowering the probability threshold at which the CMA could intervene as part of the second, in-depth, review phase. The Task Force proposed changing the test from whether a SLC is 'more likely than not' to occur to whether there is a 'realistic prospect' of a SLC as a result of the merger, similar to the standard of proof required at phase 1 of the existing mergers regime. The Government says that it is minded to lower the phase 2 threshold for intervention in mergers involving firms designated with SMS to the 'realistic prospect' approach recommended by the Task force; however, it is not minded to adopt the *Furman Review* suggestion of introducing a 'balance of harms' test.

VI. CONCLUSIONS

The topic of killer acquisitions is an intriguing one, and has raised complex questions for policy-makers, competition authorities and practitioners. The term has a pejorative tone, which is slightly unfortunate; there is no reason in principle why firms should not buy enterprising start-up businesses. Indeed, no doubt it is the prospect of selling an intelligent new idea to a wealthy purchaser that inspires many brilliant millennials to develop their innovative ideas in the first place. However, this article has hopefully demonstrated that the acquisition of nascent competitors does raise issues that merit consideration, and that there may be gaps– both jurisdictional and substantive – in existing systems of competition law. Changes have already been made to fill these gaps and others are in contemplation. It seems reasonable to expect that in five years from now the legal landscape for so-called killer acquisitions will look different from how it does today.