PREVENTING KILLER ACQUISITIONS IN THE DIGITAL SECTOR: THE COMBINATION BETWEEN ARTICLE 22 OF THE EU MERGER REGULATION AND THE DIGITAL MARKETS ACT *

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1. INTRODUCTION

In the last few decades, the European Union has been watching an increasing number of acquisitions in the digital sector. From 1987 to July 2022, there were 1149 mergers involving large digital platforms. However, only 21 fulfilled the requirements to be reviewed by the Commission.[1]

One could predict that these many unsupervised acquisitions involving a powerful acquirer could facilitate and, maybe, motivate the acquisition of innovative incumbent targets who represent potential competition only to eliminate them later on, which is the purpose of "killer acquisitions."

To address the enforcement gap, the EU designed two innovative solutions: a new approach to Article 22 of the EU Merger Regulation (EUMR) and the creation of the Digital Markets Act (DMA), which comes into force on May 2, 2023.

The new-style application of Article 22 encourages national authorities to refer mergers to the Commission for review even if the merger itself does not fulfil the national requirements for merger control.

To strengthen the supervision powers of the Commission, new rules were implemented through the DMA, regarding the so-called "gatekeepers", establishing an *ex-ante* obligation to inform the Commission of all their

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1 Carugati, 2022: 7.

intended acquisitions, as part of a process to identify the ones that would require a merger evaluation.

In this context, this article assesses the concept of "killer acquisitions" and explains how Article 22 EUMR and the DMA can be combined to prevent these *ex-post* anticompetitive mergers in the internal market, through the collaborative relationship between national competition authorities and the Commission.

2. THE CONCEPT OF "KILLER ACQUISITIONS" IN THE DIGITAL SECTOR

As Cunningham and others explain, "killer acquisitions" happen when incumbent firms "*acquire innovative targets solely to discontinue the target's innovation projects and pre-empt future competition*".[2]

Traditionally, the research on killer acquisitions focused on the pharmaceutical sector where drug studies were being discontinued after a merger event. However, because the technology sector is characterised by economies of scale, with very strong network effects and low marginal costs – making it more accessible for a start-up to enter the market –, the concerns of unfair practices in merger acquisitions grew rapidly, as some digital firms quickly developed into powerful players in the market.

Evidence shows that most large digital platforms have acquired targets that have different core businesses, which means that they tend to acquire complementary targets to their own *know-how*, rather than acquire a firm that is developing in the same market.[3]

In fact, Alphabet, Meta, Apple, Amazon, and Apple have acquired, collectively, over eight hundred companies, many of them being innovative start-ups operating in complementary markets. [4]

This type of merger is called a "conglomerate merger", which, at first glance, doesn't seem to impose restrictions on competition because the involved firms do not make directly competing products (as in horizontal mergers) or inputs used to produce the other firm's products (as in vertical mergers).

Nevertheless, conglomerate mergers can affect competition in specific cases, in particular "*where the merged entity enjoys strong market power in at*

2 Cunningham, Ederer & Ma, 2021: 649-650.

3 Carugati, 2022: 8.

4 Witt, 2022: 208–209.

least one of the markets concerned, and the merger may create possibilities for exclusionary bundling or tying practices that could disadvantage or foreclose competitors and ultimately lead to them exiting the market, or otherwise significantly impede competition in the markets concerned".[5]

In a digital setting, although a conglomerate merger may not translate into an immediate loss of direct competition, "'today's complement can become tomorrow's substitute'". "*For example, at the time of its acquisition by Facebook, Instagram was a 'mere photo app, with limited social network functionalities' but has since grown into a different product with 'fully-fledged social network functionalities*'".[6]

This demonstrates that potential competitors may first seek to develop a complementary product before starting to compete directly with other companies in a specific market.

As reported by Cunningham, the interruption of an innovative project from an incumbent target through acquisition can lead to the lack of competition and new products in a market, affecting consumers and impacting the development of industries.[7]

For these reasons, to prevent the phenomenon of killer acquisitions in the digital sector, it is crucial to supervise mergers where the acquirer is a large digital platform.

3. ARTICLE 22 EUMR

Article 22 EUMR (the, so-called, "Dutch clause"), states that, for a referral to be made by one or more Member States to the Commission, the merger must: (i) affect trade between Member States, and (ii) threaten to significantly affect competition within the territory of the Member State or States making the request.

Under the Commission's previous approach to Article 22 EUMR – and although not legally mandatory –, if a Member State of the EU intended to refer to the Commission for a merger review, the merger in question had first

5 See: "Non-horizontal Merger Guidelines", OJ C 265, 18.10.2008, para. 93. Additionally, see examples of EU conglomerate merger cases: Decision (EC) M.2220 – *GE/Honeywell*, Decision (EC) M.2416 – *Tetra Laval/Sidel* and Decision (EC) M.8124 – *Microsoft/LinkedIn*.

6 Latham, Tecu & Bagaria, 2020: 3. For reference, see Decision (OFT) ME/5525/12 – *Facebook/Instragam*.

7 Cunningham, Ederer & Ma, 2021: 691-697.

to meet the national thresholds of merger control, whether they were defined by annual turnover, market share or transaction value.

In the digital industry, "*services regularly launch with the aim of building up a significant user base and/or commercially valuable data inventories, before seeking to monetise the business*".[8]

Therefore, having a low turnover doesn't define a firm's relevance in the digital market, which can strongly depend on its data collection strategy and its ability to continuously innovate and create smarter products or services.

Although plenty of firms that provide digital services have a relevant position in the market, the majority of the EU countries lack a market share threshold for merger control. In fact, only Portugal, Spain, Latvia, and Slovenia have thresholds based on the parties' national market shares, operating as alternatives to a turnover threshold.[9]

As a result, over the years, a large number of digital mergers with a low turnover target have escaped merger scrutiny from the Commission.

Instead of adopting a new threshold, namely the transaction value, which could lead to new practical problems because not all concentrations with a high value or a high value-to-turnover ratio are competitively significant – which does not mean that the value of the transaction is not a relevant factor to be taken into account -, the Commission considered that it is more efficient to start accepting referrals from national competition authorities of mergers that are worth reviewing at the EU level – whether or not those authorities had the power to review the case themselves. [10]

This change of approach tremendously amplified the competition enforcement radar in the internal market but has caused concerns of legal uncertainty to European firms.

Hence, in March 2021, the Commission decided to clarify the appropriateness of certain categories of cases for referral under Article 22[11]. In this guidance, the Commission stated that it is appropriate to refer transactions

8 "*Communication from the Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases*", 2021/C 113/01 (JO C 113 de 31.3.2021, p. 1-6), (hereinafter "Guidance"), para. 9.

9 See: «https://www.cullen-international.com/news/2022/04/Overview-of-national-mergernotification thresholds -in-the-EU.html».

10 Vestager, Margrethe, *The future of EU merger control*, speech at International Bar Association 24th Annual Competition Conference: «https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en».

11 See footnote 10.

where the turnover of at least one of the undertakings concerned does not reflect its actual or future competitive potential, namely[12]:

(1) Cases where the undertaking is a start-up or recent entrant with significant competitive potential that has yet to develop or implement a business model generating significant revenues (or is still in the initial phase of implementing such business model);
(2) Cases where the undertaking is an important innovator or is conducting potentially important research;
(3) Cases where the undertaking is an actual or potential important competitive force.

It's clear that in these guidelines the Commission considered the research that has been written about killer acquisitions. However, this guidance lacked an appropriate explanation of the theories of harm behind it.

Nevertheless, this new approach was applied, for the first time, in April 2021, when the Commission accepted to review the proposed acquisition of GRAIL, a healthcare company developing an early multi-cancer detection test, by Illumina. Although GRAIL's competitive significance was not reflected in its turnover, it was evidenced by the $7.1 billion deal value.

Illumina appealed to the General Court of the EU and argued that the Commission's interpretation was contrary to the EUMR's "one-stop shop" principle and the principles of legal certainty, subsidiarity and proportionality. In July 2022, the General Court rejected these arguments based on its analysis of the literal, contextual, historical and teleological interpretations of Article 22 EUMR. Following the Court's decision, in September 2022, the Commission adopted a decision prohibiting Illumina's acquisition of Grail.

Currently, the Commission is expected to adopt a decision regarding the gun-jumping investigation, imposing an unprecedented fine in the coming months, possibly of $453 million.

12 Guidance, para. 19.

4. THE DMA

To complement the role of Article 22 in capturing "digital" mergers, a new European Regulation was issued regarding large digital platforms through the Digital Markets Act (DMA).

The DMA is a milestone legislation that will shape the present and future behaviours of large online platforms. Its purpose is to ensure fair competition in the digital sector and facilitate cross-border business within the internal market. It is believed that the DMA is intended to create a level playing field between European and American tech giants.

The DMA only applies to "gatekeepers" who provide a "core platform service", establishing an obligation to inform the Commission of any intended merger.

4.1. What is a "gatekeeper"?

According to Article 3 of the DMA, an undertaking shall be designated as a "gatekeeper" if:

(a) It has a significant impact on the internal market;
(b) It provides a core platform service which is an important gateway for business users to reach end-users; and
(c) It enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future.

The DMA bases these requirements on three presumptions.

First, it is presumed that an undertaking has a significant impact on the internal market if it achieved an annual Union turnover equal to or above €7,5 billion in each of the last three financial years, or where its average market capitalisation or its equivalent fair market value amounted to at least €75 billion in the last financial year, and it provides the same core platform service in at least three Member States.

Second, it is presumed that an undertaking provides a core platform service which is an important gateway for business users to reach end-users if, in the last financial year, it had at least 45 million monthly active end-users established or located in the Union and at least 10 000 yearly active business users established in the Union.

Third and last, it is presumed that an undertaking enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future if in each of the last three financial years

it had at least 45 million monthly active end-users established or located in the Union and at least 10 000 yearly active business users established in the Union.

According to data from Bloomberg, firms such as Airbnb, Alphabet (Google), Amazon, Apple, Booking Holdings, Meta (Facebook), Microsoft, Oracle, PayPal, Salesforce, SAP, Uber and Zoom could become potential gatekeepers – if they have a present or future entrenched and durable position – since criteria (a) and (b) of the Article 3 of the DMA are verified.[13]

4.2. What is a "core platform service"?

A "core platform service" is a concept which includes online intermediation services (e.g., Amazon Marketplace and App Store), online search engines (e.g., Google), online social networking services (e.g., Facebook), video-sharing platform services (e.g., Youtube), number-independent interpersonal communications services (e.g. WhatsApp), operating systems (e.g., Android and IOS), web browsers (e.g., Google Chrome), virtual assistants (e.g., Amazon Alexa), cloud computing services (e.g., Amazon Web Services) and online advertising services (e.g., Google Ads).

4.3. The obligation to inform

Although killer acquisitions are, by nature, *ex-post* anticompetitive mergers, meaning their anticompetitive essence is only observed through the behaviours of the involved firms, after the transaction itself, the DMA created an enforcement mechanism which consists in preventing their existence by establishing an *ex-ante* obligation to inform.

According to Article 14 of the DMA, gatekeepers must inform the Commission of all their intended mergers, even if they wouldn't be notifiable according to European or national merger control policies.

The information shall at least describe:

(1) The undertakings concerned by the concentration:
   a. Their Union and worldwide annual turnovers;
   b. Their fields of activity, including activities directly related to the concentration;
   c. The transaction value of the agreement or estimation thereof;

13 Carugati, 2022: 4.

d. A summary of the concentration, including its nature and rationale; and
e. A list of the Member States concerned by the concentration;

(2) The relevant core platform services:
a. Their Union's annual turnovers; and
b. Their numbers of yearly active business users and their numbers of monthly active end-users, respectively.

If gatekeepers, intentionally or negligently, do not inform the Commission of their intended mergers or supply incorrect, incomplete, or misleading information, the Commission has a period limitation of 5 years to adopt a decision and impose fines not exceeding 1% of the total worldwide turnover in the preceding financial year.

5. THE COOPERATION BETWEEN NATIONAL COMPETITION AUTHORITIES AND THE COMMISSION

The relationship between national competition authorities and the Commission lies on principles of cooperation, transparency, and publicity.

On one hand, the Commission shall inform the competent authorities of the Member States of any information received from the gatekeepers and has the duty to publish, on an annual basis, the list of acquisitions which were received from the gatekeepers.

On the other hand, competent authorities of the Member States can use the information received to determine if the transaction is notifiable at a national level and oblige the parties to notify or request the Commission to examine a concentration under Article 22 EUMR for the purposes of merger control.

The DMA's obligation to inform about mergers does not represent a typical merger notification and all that entails, such as an economic market assessment, a competitive analysis, and a binding decision over the transaction's future.

The purpose of this information is to be used in the review of the status of individual gatekeepers, for the monitorization of broader contestability trends in the digital sector and as a factor to be considered in market investigations.

Thus, the Commission does not have the right to review a merger that does not meet the European thresholds just because it received the merger's relevant information from a gatekeeper and is concerned about its competitive effects.

Only through the combination of Article 22 EUMR and the DMA, can the Commission indirectly – meaning, through a referral from an EU Member State – assess "digital" mergers that do not meet the European requirements and which, otherwise, would have escaped merger scrutiny.

Therefore, the cooperation between national competition authorities and the Commission is essential to the assessment of potential killer acquisitions in the internal market.

6. CONCLUSION

Although we consider that the new approach of Article 22 is a step in the right direction to prevent killer acquisitions, as it amplifies the enforcement radar, we believe that there needs to be a specification of theories of harm to avoid legal uncertainty, for firms operating in Europe, and inefficient allocation of resources from the national competition authorities and the Commission.

Regarding the DMA's informative obligation, this *ex-ante* mechanism will not only benefit the national merger assessments, as they can use that information to review national mergers, but also the Commission's merger control system, as it will be updated for every merger concerning large online platforms that satisfy the DMA's thresholds, by the gatekeepers themselves.

Nevertheless, an *ex-ante* regulation will not preclude the need for an *ex-post* intervention. Thus, national authorities must be attentive after a merger event in the digital sector.

Overall, if the Commission and the national competition authorities diligently cooperate under the new approach of Article 22, articulated with the DMA, we believe that the number of potential killer acquisitions will be reduced drastically, and the digital markets will become more competitive and, therefore, provide more options to consumers.

BIBLIOGRAPHY

Carugati, Christophe
2022 "Which mergers should the European Commission review under the Digital Markets Act?", in *Policy Contribution*, Issue nº 24, disponível em https://www.bruegel.org/policy-brief/which-mergers-should-european-commission-review-under-digital-markets-act

Cunningham, Colleen, Ederer, Florian & MA, Song
2021 "Killer acquisitions", in *Journal of Political Economy*, vol. 129(3)

Latham, Oliver, Tecu, Isabel & Bagaria, Nitika
2020 "Beyond Killer Acquisitions: are there more common potential competition issues in tech deals and how can these be assessed?", in *CPI Antitrust Chronicle,* maio, vol. 2, n.º 2

Witt, Anne C.
2022 "Who's afraid of conglomerate mergers?", in *The Antitrust Bulletin*, vol. 67(2), pp. 208-236

Vestager, Margrethe
2020 "The future of EU merger control", in *International Bar Association 24th Annual Competition Conference*, disponível em https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en

Cullen International
2022 https://www.cullen-international.com/news/2022/04/Overview-of-national-merger-notification-thresholds-in-the-EU.html