EU Merger Review of "Killer Acquisitions" in Digital Markets - Threshold Issues Governing Jurisdictional and Substantive Standards of Review

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I. Introduction 64
II. Pharmaceutical v. Digital Sector Mergers 67
III. Proposed Threshold and Notification Adjustments 71
IV. Transaction Values 72
V. Mandatory Notifications. 76
VI. EU Referral System 80
VII. Residual Powers of Review 83
VIII. Substantive Standards of Review . . 87
IX. Balance of Harms Test 89
X. Shifting Burden of Proof 93
XI. Alternative Theories of Harm 97
XII. Conclusions 100

I. Introduction

A growing discontent has spread over the past few years that large digital platforms are putting themselves in a position of unassailable market power through their many acquisitions of fledgling companies that offer niche digital products or services.[1] In doing so, the oft-recurring allegation is that

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[1] Refer to, *inter alia*, Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, *Competition Policy for the Digital Era* (March 2019) <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed ; Heike Schweitzer and others, *Modernising the Law on Abuse of Market Power: Report for the Federal Ministry for Economic Affairs and Energy (Germany)*, (2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3250742> accessed; Jason Furman and others, *Unlocking Digital Competition: Report of the Digital Competition Expert Panel* (March 2019) 12 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf>accessed; Elena Argentesi and others, *Ex-post Assessment of Merger Control Decisions in Digital Markets* (9 May 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803576/CMA_past_digital_mergers_GOV.UK_version.pdf> accessed; Fiona Scott Morton and others, *Committee for the Study of Digital Platforms: Market Structure and Antitrust Subcommittee* (May 2019) <https://www.judiciary.senate.gov/imo/media/doc/market-structure-report%20-15-may-2019.pdf> accessed; Letter from the Dutch State Secretary of Economic Affairs and Climate (May 2019) < https://www.government.nl/documents/letters/2019/05/23/

these large digital platforms take advantage of their scale and scope, larger and more varied data collections, and direct and indirect network effects, thereby making their offerings irresistible to consumers and erecting barriers to switching for consumers. By doing so, the narrative proceeds, the digital markets affected become uncontestable as they 'tip' in favour of the serial acquiring digital platform, thereby creating a 'winner takes all' situation in those some markets.[2]

The origins of concern about such 'killer acquisitions' stem from a study conducted in the wake of a series of mergers in the pharmaceutical sector, the net effect of which was said to be the loss of innovation, the raising of prices of key pharmaceutical products and the loss of choice for consumers.[3] According to a body of expert opinion, large pharmaceutical companies had engaged in a systematic policy of acquisition of smaller potential rivals with a view to ensuring that their pipeline products would not enter the market and upset the acquiror's monopoly with respect to certain patented drugs.

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future-proofing-of-competition-policy-in-regard-to-online-platforms> accessed; Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (June 2019) <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf> accessed; Competition Authorities Working Group on Digital Economy, 'BRICS in the Digital Economy: Competition Policy in Practice' (18 September 2019) <http://en.fas.gov.ru/documents/documentdetails.html?id=15348> accessed; Autoridade da Concorrencia, *Digital Ecosystems, Big Data and Algorithms* (July 2019) <http://www.concorrencia.pt/vPT/Estudos_e_Publicacoes/Estudos_Economicos/Outros/Documents/Digital%20Ecosystems,%20Big%20Data%20and%20Algorithms%20-%20Issues%20Paper.pdf> accessed; *Joint Memorandum of the Belgian, Dutch and Luxembourg Competition Authorities on Challenges Faced by Competition Authorities in a Digital World* (2 October 2019) <https://www.belgiancompetition.be/sites/default/files/content/download/files/bma_acm_cdlcl.joint_memorandum_191002.pdf> accessed; Common Understanding of G7 Competition Authorities on "Competition and the Digital Economy" (5 June 2019) <> accessed ; Italian Competition Authority, the Data Protection Authority and the Telecommunications Regulator, 'Big Data Joint Survey: Guidelines and Policy Recommendations' (July 2019) < accessed; Japan Fair Trade Commission, 'Outline of Interim Report Regarding Trade Practices on Digital Platforms' (April 2019) <> accessed; Stigler Center for the Study of the Economy and the State, 'Stigler Committee on Digital Platforms: Final Report' (2019) <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf?la=en&hash=2D23583FF8BCC560B7FEF7A81E1F95C1DDC5225E&hash=2D23583FF8BCC560B7FEF7A81E1F95C1DDC5225E>accessed; Competition Commission of India, 'Market Study on E-Commerce in India: Key Findings and Observations' (8 January 2020) <https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf> accessed.

[2] As regards the characteristics of the digital markets and their ability to easily 'tip' into monopoly because of network effects, refer to discussion in OECD, *The Digital Economy* (2012) 8 <http://www.oecd.org/daf/competition/The-Digital-Economy-2012.pdf> accessed.

[3] The term '*killer acquisition*' was originally coined in the study of Colleen Cunningham, Florian Ederer and Song Ma, 'Killer Acquisitions' (2021) 129(3) Journal of Political Economy 649 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3241707> accessed.

Those acquisitions went largely unscrutinised as the relatively low turnovers of targets at their initial stages of R&D and product formulation meant that the deals fell below the merger control radar of jurisdictions around the world, including the European Union ('EU'). In a similar vein, the loss of potential competition led to a series of competition law infringement actions against dominant pharmaceutical firms that were keen to prevent competition from generic drug manufacturers wishing to enter the market upon the expiry of their drugs.[4]

Seen in this light, the dilemma faced by competition policymakers is twofold.

First, there has been widespread concern that so many of these so-called 'killer acquisitions' fall outside merger control scrutiny because the size of the target in terms of existing revenues is so low that traditional merger thresholds are not satisfied. Critics therefore argue that it is bad public policy to systematically allow mergers capable of generating serious anti-competitive effects on digital markets to be realised, without at least some level of effective scrutiny. To this end, consideration needs to be given to creating new legal thresholds which would allow for the more widespread review of killer acquisitions in the digital space.[5]

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[4] This has been the case in the recent surge in the European Commission's Decisions and European Court's Judgments regarding the so-called 'pay-for-delay' arrangements in the pharmaceutical sector. See Case C-307/18 *Generic (UK) Ltd and Others v Competition and Markets Authority* [2020]; Case C-591/16 P *H Lundbeck A/S and Lundbeck Ltd v European Commission* [2021], Case C-176/19 P *Servier and Others v Commission* [2019] OJ C139/37; Case C-201/19 P *Servier and Others v Commission* [2019] OJ C139/39. With the benefit of hindsight, the European Commission has been able to identify 19 acquisitions in the pharma sector in the period 2009-2017 which were problematic in terms of their adverse effects on potential competition (i.e., their potential to increase prices, diminish the number of available medicinal products and hinder innovation). Refer to European Commission, 'Competition Enforcement in the Pharmaceutical Sector (2009-2017)' (2019)14 <https://ec.europa.eu/competition/publications/reports/kd0718081enn.pdf> accessed.

[5] According to Elena Argentesi and others, 'Merger Policy in Digital Markets: An Ex-Post Assessment'(2019) DIW Berlin Discussion Paper 19, 60% of acquisitions made by digital providers such as Amazon, Facebook, and Google were of firms that were less than four years old. In addition, it is estimated that the five largest global digital firms have acquired in excess of 400 companies over a period of ten years; see Furman and others (n 1) 12. In turn, the *Lear Report* concluded in 2019 that, since 2008, Google had bought over 168 companies while Facebook had bought 71, with many of the acquisitions being deemed to be potential competitors; see Argentesi and others, 'Ex-Post Assessment of Merger Control Decisions in Digital Markets' (n 1) 10. Refer also to the announcement by the Federal Trade Commission of the United States to the effect that it intended to examine past acquisitions by large technology companies (2020)<https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies> accessed.

Second, there has been a significant level of debate as to whether, even where merger thresholds have been triggered, existing legal standards of review for those mergers are not appropriate for changes in market structure in the digital sector, given the uneven nature of market developments driven by technological innovation and radical shifts in business models. Accordingly, some critics have argued that existing legal standards of review should be diluted or modified in order to facilitate the task of the merger review body, either in general terms to cover all mergers or more specifically with respect to digital sector mergers. The central idea underpinning such changes to the substantive test for review is that merger regulators should be more concerned about letting potentially anti-competitive mergers escape a prohibition sanction than about engaging in excessive intervention.[6]

Judged primarily from the perspective of the merger regime prevailing in the EU, we consider below the various pros and cons in the proposals for change in relation to jurisdictional thresholds and substantive tests of review that might be adopted for digital sector mergers.

II. Pharmaceutical v. Digital Sector Mergers

In order to better understand the implications of what would constitute a 'killer acquisition' in the world of digital markets, we are inspired by the particular implications of that expression that has originated in the context of pharmaceutical sector mergers.

In their widely acknowledged study of the US pharmaceutical sector, Cunningham *et al* identify a 'killer acquisition' as one where the acquiring firm's strategy is "*to discontinue the development of the targets' innovation projects and pre-empt future competition*."[7] The theory of harm behind such an acquisition would focus on the incumbent firm acquiring an innovative firm which it would subsequently shut down, thereby 'killing' the manufacture of a product that poses a potential threat to its established product

[6] Until this very recent re-examination of whether it is better to err on the side of under-enforcement than over-enforcement, competition enforcement policy had for decades preferred to opt for the under-enforcement option on the ground that 'Type 1 errors' (i.e., the risk of over-enforcement) are more pernicious, as they would prevent innovation, with the assumption being that 'Type 2 errors' (i.e., the risk of under-enforcement) will usually be capable of being quickly corrected through the growth of new rivals. See also OECD, 'Start-ups, Killer Acquisitions and Merger Control – Background Note' (2020) <https://one.oecd.org/document/DAF/COMP(2020)5/en/pdf> accessed ; OECD, 'Start-ups, Killer Acquisitions and Merger Control' (2020) <http://www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control-2020.pdf> accessed.

[7] Cunningham, Ederer and Ma (n 3) 1.

line.[8] In the alternative, the acquiror might kill-off its own internal efforts to develop a competing product in order to remove a potential risk to the newly acquired product.[9] Under both scenarios, there is a net welfare loss to society. The authors concluded that approximately 6% of all acquisitions in the pharmaceutical sector have resulted in the discontinuation of competing innovative projects, which has in turn accounted for approximately fifty acquisitions per annum.[10] While this number may not seem high in absolute terms, its relative importance is said to be magnified by the range of potential consumer and wider societal benefits that might otherwise have occurred in the absence of the acquisitions. Given that the pharmaceutical sector is characterised by drug prices which are often volatile and where price spikes are not uncommon, one can understand the public policy concerns surrounding innovation loss as a likely outcome of a merger, especially where enduring high prices under quasi-monopoly conditions might prevail.

The findings of the Cunningham study make much good sense in a sector which is characterised by absolute patent monopoly for a finite period of time (usually twenty years),[11] where the various stages of development of a 'pipeline' product are well understood and clearly structured[12] and where

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8 Refer to KJ Arrow, 'Economic Welfare and the Allocation of Resources for Invention' in National Bureau of Economic Research (ed), *The Rate and Direction of Inventive Activity: Economic and Social Factors* (Princeton University Press 1962).

9 Such a transaction is referred to by some economists as a 'reverse killer acquisition'. In such cases, the incumbent acquires a smaller company in order to escape the process of putting in the innovative effort itself. It has been demonstrated that established incumbent operators in competitive spaces such as high tech, digital payments, the Internet and pharma, have acquired special features, functionalities and even businesses with a view to cut down on the time and the level of effort that would otherwise be required to sustain a successful commercial product or service through organic expansion. This type of analysis figured prominently in the UK Decisions of the CMA in ME/6766/18 *Paypal/iZettle* [2019], ME/6806/19 *Sabre/Farelogix* [2020], and most recently in ME/6836/19 *Amazon/Deliveroo* [2020], where the CMA's competition concerns included whether or not the acquisition allowed the buyer to forego its own efforts in the area of specialisation of the target, thereby eliminating the prospect of future competition (in the latest case, the concern was that Amazon would compete less aggressively and have fewer incentives to improve its own online convenience groceries following the merger with Deliveroo). In this regard, see Cristina Caffarra, Gregory Crawford and Tommaso Valletti, '"How Tech Rolls": Potential Competition and "Reverse" Killer Acquisitions' (*Competition Policy International*, 26 May 2020) <https://www.competitionpolicyinternational.com/how-tech-rolls-potential-competition-and-reverse-killer-acquisitions/> accessed.

10 Cunningham, Ederer and Ma (n 3) 6.

11 According to the Convention on the Grant of European Patents 1973 (European Patent Convention) art 63, the maximum term of a European patent is 20 years from its filing date. The patent may lapse earlier following opposition proceedings, or, may be extended in certain circumstances in the case of medical or plant protection product patents.

12 The regulation of so-called 'pipeline products' – pharmaceutical products under development - requires the monitoring of the new drug's progress through a drug development and approval process necessitating the publication of the product's details. For recent European

the abrupt loss of an absolute monopoly right overnight raises obvious issues about the level of potential competition likely to be generated by potential market entry prompted by generic producers.[13] In such circumstances, shutting down a fledgling competitor could allow an incumbent firm to extend its patent monopoly artificially.

However, these conditions are unlikely to arise in the case of most digital sector mergers. In these cases, it is much more likely that the acquisition will be motivated by the desire to develop the services of the start-up target firm, rather than shutting them down. Moreover, the preference will inevitably be to integrate the target's services into the broader 'ecosystem' which sustains the acquiror's existing services platform. The theory of harm underpinning such an acquisition will therefore in most cases be vastly different from the usual killer acquisitions identified in the pharmaceutical sector, given that the integration of innovative complementary services often has a much clearer rationale in the digital services sector in terms of its ability to generate efficiencies. In digital market cases, assessing the likely theory of harm is therefore a much more complex exercise, given that product development is less structured and the pace and success of innovation is much more problematic. While the threat of generic drug entry in the pharmaceutical industry can be clear and calculable, it can be anything but scientific determining which innovations in high-tech fields might constitute a genuine competitive threat and which others might be little more than a noble (or ignoble) marketplace failure.[14] Many mergers in the telecommunications sector in

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Commission decisional practice requiring divestitures in early pipeline products in order to protect potential innovation, refer to *Novartis/GlaxoSmithKline Oncology Business* (Case M.7275) [2015]; *General Electric/Alstom* (Case M.7278) [2015] OJ C139/6.

[13] The threat of generic drug entry to an incumbent firm's profits became clear following the disclosure of the amounts and the disproportionate nature of the recently considered pay-for-delay payments. For recent commentary see Peter Alexiadis and Pablo Figueroa, 'Mixed Messages in the "By Object" vs "By Effects" Saga: The Enigma of Lundbeck' (*Competition Policy International*, February 2018) <https://www.competitionpolicyinternational.com/mixed-messages-in-the-by-object-vs-by-effects-saga-the-enigma-of-lundbeck/> accessed; Bill Batchelor and others, 'Lundbeck Raises More Questions than Answers on "Pay-for-Delay" Settlements; Creates Damaging Divergence from US Law' (2017) 38 European Competition Law Review 3; Sandra Marco Colino and others, 'The Lundbeck Case and the Concept of Potential Competition' [2017] Concurrences 24; Romano Subiotto and Jacopo Figus Diaz, '*Lundbeck v Commission*: Reverse Payment Patent Settlements as Restrictions of Competition by Object' (2017) 8(1) Journal of European Competition Law & Practice 27.

[14] Even in the pharmaceutical sector, it was calculated that only 3.6% of projects would have been preserved by a prohibition on 'killer acquisitions', given the existing failure rates for new drugs; only 14% of all drugs involved in clinical trials result in approvals from health authorities. See Conor Hale, 'New MIT Study Puts Clinical Research Success Rate at 14 Percent' (5 February 2018) <https://www.centerwatch.com/articles/12702-new-mit-study-puts-clinical-research-success-rate-at-14-percent#:~:text=New%20MIT%20Study%20Puts%20Clinical%20Research%20Success%20Rate%20at%2014%20

Europe, for example, rather than being driven by any desire to foreclose new entry, were characterised for a significant period of time after liberalisation in the early 1990s by a wave of acquisitions across delivery platforms precisely because investors were uncertain as to which delivery platform would be in the ascendancy in the longer term.[15]

Accordingly, when applied to the digital sector, the expression 'killer' acquisitions could just as readily refer to the acquisition of nascent firms, the competitive significance of whose products or services might be highly speculative.[16] In circumstances where more apps fail than succeed commercially, it will be exceedingly difficult for a merger review authority to predict with any degree of certainty what is likely to be the competitive outcome of a digital sector merger in such circumstances. While a true 'killer' acquisition would almost certainly harm consumer welfare by depriving the market of innovative alternatives, it is far more difficult to arrive at the same conclusion about acquisitions of nascent competitors in the tech space, many of which undoubtedly enhance consumer welfare in a number of respects by expanding the distribution of innovative products. This can be achieved *inter alia* by the addition of newly acquired features, applications and functionalities to existing services. By contrast, a theory of harm based on the loss of potential competition would in principle be more readily available in the case of the pharmaceutical sector where there exists a strong possibility that the acquired product or service would grow into a rival product or service of the acquiror, thereby removing the competitive threat posed by the acquired product or service.[17] Thus, whereas theories of harm usually associated with the pharmaceutical sector are built on concerns about restrictions in supply which lead to potential rises in price (i.e., a form of 'unilateral effects' theory of harm), theories of harm in digital market mergers will invariably turn on whether potential expansions in supply will exacerbate existing economies

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Percent,-February%205%2C%202018&text=Nearly%2014%20percent%20of%20all,MIT%20Sloan%20School%20of%20Management> accessed. Moreover, as has been pointed out elsewhere, besides the fact that R&D in the digital sector is less structured than the world of pharma and is thus not contingent on extensive and clear R&D phases, it is also the case that many digital products are replicable, which renders them obsolete within a few years. Refer to Mats Holmström and others, 'Killer Acquisitions? The Debate on Merger Control for Digital Markets' 2018 Yearbook of the Finnish Competition Law Association 19.

[15] By way of example, refer to the various acquisitions of stakes in telecommunications companies by Microsoft in the 1990s, including AT&T ($5 billion), Comcast ($1 billion), Titus in Japan ($950 million), Korea Telecom ($500 million), United Pan-Europe Comm NV ($300 million), NTL ($500 million), TV Cabo Portugal SA ($38.6 million), and Telewest ($5 million). More recently, other deals have included mergers involving Ericsson, Skype, and LinkedIn.

[16] OECD, Start-ups, Killer Acquisitions and Merger Control (n 6).

[17] ibid.

of scale and scope, thereby leading those markets to become incontestable over time.

Accordingly, rather than formulating theories of harm around the loss of potential competition, in the vast majority of cases it will be more appropriate to examine a digital market merger of a start-up digital player by reference to alternative theories of harm, including:

- potential vertical foreclosure concerns in downstream markets through the ability of a party, *inter alia,* to control key inputs in the supply chain;[18] and
- potential conglomerate effects generated by the fact that the acquired products or services are complements to the acquiror's products or services, which might facilitate the tying or bundling of such products or services or which might generate incentives for the merged firm to thwart interoperability.[19]

Consequently, any read-over by policymakers in the approach to "killer acquisitions" in the digital sector from experiences learned from the pharmaceutical sector must be made with great circumspection, especially given that the respective theories of harm associated with acquisitions in these respective sectors are likely to be so different.

III. Proposed Threshold and Notification Adjustments

Even if one concedes that acquisitions of fledging digital firms might be capable of raising serious competition concerns in particular digital markets, the question remains as to which jurisdictional thresholds need to be drawn for merger notifications in order to ensure that effective merger review can occur. Thus far, various reports and commentaries released around the world suggest that a number of alternative approaches might be relied upon to determine when it is appropriate for a merger review body to intervene. For example, the following alternatives have been considered:

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18 OECD, Vertical Mergers in the Technology, Media and Telecom Sector: Background Note by the Secretariat (2019) <https://one.oecd.org/document/DAF/COMP(2019)5/en/pdf> accessed.

19 OECD, Roundtable on Conglomerate Effects of Mergers: Background Note by the Secretariat (2020) <https://one.oecd.org/document/DAF/COMP(2020)2/en/pdf> accessed.

- a merger threshold test based on **transaction values**, rather than on the traditional revenue tests used to determine the relative importance of a transaction;
- **mandatory notifications**, based on the market presence of the acquiror, to be determined by reference to a range of potentially different criteria which suggest that the acquiror has some degree of market power;
- specifically in relation to the EU, a re-calibration of the criteria used in the **referral system** pursuant to which a merger is forwarded to the European Commission ("Commission") that would otherwise be subject to reviews in multiple national jurisdictions across the EU; or
- the existence of **residual powers of review** that would permit a merger review body to assess the competitive implications of any merger after its consummation, at least in those well-articulated situations where it is felt that the competitive implications of the merger in question are so serious as to justify such an additional *ex post* review.

Each of these alternative approaches are considered below by reference to criteria such as the need for legal clarity, the proportionality of intervention, and the extent to which material improvements in enforcement policy could be expected from such shifts in jurisdictional powers.

IV. Transaction Values

The most often-touted legal mechanism by which merger agencies could review more digital market mergers lies in the proposal that merger review thresholds can be based on transactional values, usually as a supplement to the prevailing standard of jurisdictional tests based on the historical revenues of the merging parties. In this way, the inconsequential revenues of digital start-ups need not prove to be a bar to merger review if the acquiror sees real potential value in its target. This was one of the key proposals considered in the *Cremer Report*, among others.[20] By the same token, the *Cremer Report* also noted that a jurisdictional transaction value-based test would be likely to create an additional administrative burden on agencies and EU businesses alike, with the result that its application would be likely to be resource-intensive.[21]

[20] Crémer, de Montjoye and Schweitzer (n 1) 113.
[21] ibid 114.

The authors Bourreau & de Streel[22] do not consider that the introduction of such a transaction value standard would dramatically increase the overall volume of notifiable mergers, as merger transaction value is in any event usually closely linked to the turnover of merging firms. Nor do they envisage that such a standard should operate automatically. Rather, they foresee that such an additional jurisdictional test should be applied at the discretion of the merger review body where the high transaction cost is deemed to reflect presumed important revenue streams of the innovative target in the foreseeable future (which might be welfare-enhancing) or the premium that the acquiror is willing to pay to ensure that they have market stability and the ability to generate monopoly rents in the wake of "killing" the innovative technology of the acquired firm.[23] More generally, it is worth noting that there are already a number of jurisdictions which accord transaction value an important role when determining when merger control jurisdiction can be exercised.[24]

At the time of writing, reliance on merger thresholds that are based on transactional values is being explored in India, as reflected in the introduction of a draft *Competition Amendment Bill* in March 2020.[25] The Bill authorises the Competition Commission of India ('CCI') to examine transactions even if the asset or revenue thresholds have not been met. Specifically, Section 6(a) of the new draft law confers power on the CCI, acting in conjunction with the government, to identify *new thresholds* for merger notification that would be required under the *Indian Competition Act 2002*.[26] These may *inter alia* be based on the value or size of the transaction, and should be used in the public interest.[27] The Indian government is conducting a public consultation on the draft Bill, which it describes as "*a forward-looking amendment*".[28] In parallel, a public consultation on the introduction of a "size of transaction" merger threshold, in addition to existing revenue thresholds,

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[22] See Marc Bourreau and Alexandre de Streel, 'Digital Conglomerates and EU Competition Policy' (*Centre de Recherche Information, Droit et Société*, 26 February 2019) 32 <http://www.crid.be/pdf/public/8377.pdf> accessed.

[23] ibid.

[24] Refer to discussion in Peter Alexiadis, Elsa Sependa and Laura Vlachos, 'Merger Control: "Around the World in 80 Days: Management of the Merger Review Process of Global Deals"' (2018) 19(3) Business Law International 201 <https://www.gibsondunn.com/wp-content/uploads/2018/09/Alexiadis_Sependa_-_BLI_-_Merger_Control_-_Around_the_World_in_80_Days.pdf> accessed.

[25] The draft Bill is currently undergoing the stage of public consultation ordered by the Indian Government <https://www.cci.gov.in/node/4992> accessed .

[26] As required by the Competition Act 2002, ss 5(a), 5(b), 5(c) <https://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf> accessed .

[27] See the Draft Amendment Bill, s 6(a).

[28] See Gireesh Chandra Prasad, 'Competition Commission of India to Get More Teeth to Regulate Tech M&As' (22 February 2020) <https://www.

has been completed in South Korea as of 7 August 2020 by that nation's Competition Authority, the KFTC. Changes to the existing thresholds are due to be adopted by the Korean national assembly following a formal submission by the KFTC. The amended law is expected to come into force as early as the second half of 2020.[29]

In Europe, largely in response to a number of high profile digital sector transactions that have slipped under various merger review powers over the years,[30] both Germany[31] and Austria[32] respectively introduced transaction value tests in 2017 in order to bring 'killer acquisitions' in the digital sector within their respective jurisdictional remits. However, in practice this exercise has brought only a handful of additional mergers within the scope of the German and Austrian mandatory merger filing obligations,[33] with the new thresholds attracting a range of transactions outside the digital sector (i.e., predominantly in pharmaceuticals and the business segment of the real estate sector).[34] An initial overview of the success of the German and Austrian experiences has suggested to the OECD that, given the small amount of transactions caught under the new jurisdictional test, businesses could hardly be said to have borne significant additional costs in terms of regulatory compliance.[35] On the positive side, notes the OECD, the additional cases reviewed may have been successful in deterring any regulatory

livemint.com/politics/policy/competition-commission-of-india-to-get-more-teeth-to regulate-tech-m-as-11582312178757.html> accessed.

[29] Refer to Seong Un Yun and others, 'BKL Legal Update-Antitrust 2020-10' (10 June 2020) <https://www.lexology.com/library/detail.aspx?g=a69db1a1-86e6-4f67-b47d-d01f729ed7ff> accessed.

[30] Notable mergers that have famously escaped the European Commission's scrutiny include *Facebook/Instagram* and *Google/Waze*. Both were caught only by UK merger control under a 'share of supply test' and subsequently scrutinised by the UK Office of Fair Trading. See UK Office of Fair Trading Case ME/5525/12 *Facebook/Instagram* [2012] and UK Office of Fair Trading Case ME/6167/13 *Google/Waze* [2013].

[31] German Act Against Restraints of Competition 2013 as amended by the 9th amendment, sec 35(1a). For German Competition Authority's commentary refer to <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2> accessed.

[32] Austrian Cartel Act 2005 as amended by the Austrian Cartel and Competition Law Amendment Act 2017, sec 9(4). For Austrian Competition Authority's commentary refer to <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2> accessed.

[33] Refer to Martin Sauermann, 'The Transaction Value Threshold in Germany - Experiences with the New Size of Transaction Test in Merger Control' (8 October 2019)<https://www.competitionpolicyinternational.com/the-transaction-value-threshold-in-germany-experiences-with-the-new-size-of-transaction-test-in-merger-control/> accessed.

[34] ibid. The post notes the sectoral distribution of the concerned transaction as being spread between the 'pharmaceutical, chemical and IT industries'. Refer further to OECD, 'Non-price Effects of Mergers – Note by Germany' (25 May 2018) 6-8 <https://one.oecd.org/document/DAF/COMP/WD(2018)12/en/pdf> accessed .

[35] OECD,'Start-ups, Killer Acquisitions and Merger Control' (n 6) 44.

'gaming' of the previous turnover-only based notification system by deterring some mergers from taking place. By the same token, the OECD has also considered the possibility that some large digital firms might alter their behaviour by engaging in more speculative mergers earlier on in the innovation cycle of a target firm prior to their valuation reaching the prescribed transactional value thresholds.[36]

In determining whether or not a transaction value test is best suited to address any perceived gap in the review of mergers in the digital sector, the initial stumbling block will be to determine the appropriate transaction value level at which any notification threshold will be set. Given that what constitutes a significantly large transaction value may vary greatly from sector to sector,[37] identifying an appropriate value level may prove to be a thankless task if one goes beyond the targeting of a particular industrial sector. Although one can imagine that the major interest in formulating such a test derives from mergers in the digital sector, there appears to be no reason why other high value, IP-driven sectors such as pharma or agrochemicals should be excluded from the operation of such a complementary jurisdictional test. The drawing of the value threshold net so widely across all sectors means, however, that the drawing of any demarcation point will be seen to achieve arbitrary outcomes in terms of the deals that are captured, while at the same time forsaking a significant degree of legal certainty. Accordingly, it would appear that policymakers are likely to be drawn towards the adoption of a transaction value test which will apply in principle to *all* industrial sectors, while at the same time seeking to set that level so that it catches *only* those transactions which have the potential to be problematic in certain key industrial sectors. In these circumstances, the prescription of one relevant transaction value to catch all mergers may be both elusive and might constitute a classic case of 'over-kill'.

Arguably the greatest drawback of adopting a transaction value test lies in the fact that the perceived 'value' of a transaction is spread unevenly around the world, depending *inter alia* on the origins of the merging parties, their catchment areas in terms of existing sales, the range of their IP protection, and brand awareness in particular cultures and demographics.

[36] ibid.

[37] In a similar vein, joint control over a company's affairs is often inferred from the ability of a shareholder to be able to veto certain types of investment decisions above a specified amount. Whether or not that specified amount is a trigger for the exercise of joint control depends on the scale of investments anticipated in the particular industry in which the company operates. See EU Consolidated Jurisdiction Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings [2008] OJ C95/1, paras 65-67.

One jurisdiction's perception of a high value may not accord at all with the comparable perception taking place in another jurisdiction. Accordingly, conducting a merger review because of the 'value' of that merger is likely to require heroic assumptions being made about the true value of that transaction in those jurisdictions where it will be the subject of a merger review. Even within the EU, when one considers the different respective sizes of the economies of the 27 EU Member States, one can imagine that there might be very different perceptions as to where the valuation standard should be set.[38] Given that the world is already awash with over 146 jurisdictions with merger regimes,[39] many of which draw tenuous links between the proposed deal and the physical territory of many of those jurisdictions, the introduction of a transaction value threshold might only add to existing levels of legal uncertainty because of yet another filing criterion whose nexus with the merger review process is speculative. At an even more fundamental level, one needs to ask about the moment in time when "value" is to be measured and the accuracy of that measurement, especially given the extravagant shifts in value experienced on the world's stock exchanges.

Accordingly, as of 2020, there are many reasons why we would not endorse the overall recommendation of the *Cremer Report*[40] *to the effect that the turnover thresholds in the existing EU Merger Regulation* should not be complemented by a transaction value test, at least until meaningful knowledge has been built up over the years about the practical effect of the comparable amendments that are already in force in Germany and Austria.

V. Mandatory Notifications

An alternative reform proposal that has found favour in a number of international reports is based on the unique range of competition concerns surrounding digital platforms. Accordingly, it has been proposed that large

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38 For example, it would usually be arbitrary to apportion a part of the value of a transaction based on prospective revenue expected to be generated from any given jurisdiction, the relative GDP of that jurisdiction or any other *pro rata* measurement of a given jurisdiction's relative importance compared to the remaining value attributable to the target on a global basis.

39 International Chamber of Commerce, 'ICC Recommendations on Pre-Merger Notification Regimes' (March 2015) <https://iccwbo.org/publication/icc-recommendations-pre-merger-notification-regimes/#:~:text=More%20than%20146%20jurisdictions%20around,regime%20under%20their%20antitrust%20laws> accessed.

40 Crémer, de Montjoye and Schweitzer (n 1) 115. In her recent speech given in September 2020, Commissioner Vestager has in a similar vein concluded that amendment of the EU Merger Regulation in order to add a transaction value threshold arguably does not constitute the most proportionate solution <https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en> accessed.

market actors in the digital space be uniquely burdened with *sui generis* merger filing obligations when they are considered to hold positions of market power.[41] The clear public policy challenge, however, is which unique screening mechanism could possibly apply to digital sector mergers without forsaking the requisite degree of legal certainty usually associated with filing obligations.

One of the clearest preferences for the adoption of a *sui generis* filing approach has been voiced by Australian Competition and Consumer Commission ("ACCC"), which has expressed the view that very large (pre-designated) digital platforms should provide advance notice of all their potential acquisitions. Thus, one of the key recommendations of the ACCC Report is that:

> "*Large digital platforms to agree to a notification protocol, to provide advance notice to the ACCC of any proposed acquisitions potentially impacting competition in Australia. The details of the notification protocol will be agreed between the ACCC and each large digital platform, and would specify: the types of acquisitions requiring notification (including any applicable minimum transaction value), and the minimum advance notification period prior to completion of the proposed transaction to enable the ACCC to assess the proposed acquisition. If such a commitment were not forthcoming from the large digital platforms, the ACCC will make further recommendations to the Government that address this issue.*"[42]

The ACCC proposal is, at least to some degree, the by-product of the hybrid competition law/regulatory legal framework in operation in Australia, especially as regards its anticipated harnessing of the goodwill of large digital platforms to formulate a notification protocol for digital market players. To many jurists from other countries, this invitation to formulate a consensual notification standard might be tantamount to asking "*turkeys to vote for Christmas*" or simply might provide little more than a forum for a

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[41] Some of these recommendations are made in conjunction with proposals to introduce transactional value thresholds or with proposals for the reversal of the burden of proof. See, for example, the recent French draft law providing for an obligation on "*dominant digital companies*" to inform the French Competition Authority about all acquisitions "*likely to affect the French market*" one month in advance of the transaction; see Proposition de loi n° 302 du Sénat le 5 février 2020 visant à garantir le libre choix du consommateur dans le cyberspace, arts L.430-2-1(I) <http://www.senat.fr/leg/ppl19-302.html> accessed . The draft law was approved by the French Senate on 8 July 2020, and is now due for deliberation before the National Assembly.

[42] Australian Competition and Consumer Commission (n 1) 30.

protracted debate which could produce an unworkable notification obligation in practice.

A variant to the Australian approach can be found in the proposal set forth in the US under the *Stigler Report*.[43] According to *Stigler*, it would be advisable to create a new sectoral agency (a 'Digital Authority') whose responsibilities would include merger review for those digital platforms considered to hold 'bottleneck power', rather than reliance being placed on the usual revenue-based tools used to trigger notification obligations. Thus, the new agency would be able to review "*even the smallest transactions involving digital businesses with bottleneck power because nascent competition against these entities is very valuable for consumers*".[44] The US Digital Authority's merger powers would apply in parallel with those of the Department of Justice ('DoJ') and the Federal Trade Commission ('FTC'), but would apply different legal standards and would use different procedural tools. The *Stigler Report* concludes that this fundamental shift in enforcement policy is much more proportionate if implemented in a merger context rather than in relation to behavioural practices. Accordingly, "*it would not be prudent to alter the nation's antitrust laws to accommodate one difficult and fast-moving sector where false negatives are particularly costly. Therefore, giving additional power over merger review to the sectoral regulator is a good solution*".[45]

The US approach has both its pros and its cons. While the magnitude of the error in terms of 'false negatives' is indeed arguably greater in the context of a merger control setting than in the prosecution of actions under Sections 1 and 2 of the *Sherman Act*, this is arguably because US antitrust rules are subject to onerous burdens of proof which need to withstand judicial scrutiny on the merits (rather than in accordance with administrative law principles), and because the financial implications of antitrust infringements are so severe.[46] This is not a policy trade-off that is so clear-cut in most other jurisdictions around the world, especially given that the separation between antitrust rules and sector-specific regulation in the US is a principle which

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[43] Stigler Center for the Study of the Economy and the State (n 1) 104.

[44] ibid 33.

[45] ibid 111.

[46] Aside from the residual evidentiary difficulties confronting all antitrust enforcement agencies, US authorities need to be prepared to argue their cases before a judge (rather than according to variants of public administrative law standards, while being subject at a later point in time to a judicial appeal). Moreover, the US treble damages rule raises the stakes for antitrust litigation significantly in comparison to legal systems based on the Continental legal tradition.

is adhered to strictly.[47] Doctrinally, it is difficult to envisage such a system being implemented in the US, especially given the fact that sector -specific powers would not extend beyond the domain of merger control[48] and the fact that the existing dual merger review system already implemented by both the DoJ and the FTC has its own well acknowledged difficulties in terms of inconsistencies in approach and cost duplication.[49]

Finally, the proposals put forward in the UK's *Furman Report* set forth another variant to the approaches proposed in Australia and the US. Under the *Furman* proposals, those digital companies designated to hold "Strategic Market Status" would be required to notify their transactions to the UK's Competition and Markets Authority ('CMA'), despite the UK merger regime otherwise remaining "voluntary" in nature. According to the logic of the *Furman Report*:

> "*The largest digital companies conduct a high volume of acquisitions. It is voluntary whether they notify the CMA of the merger. Requiring digital companies that hold a strategic market status to make the CMA aware of their intended acquisitions will allow the CMA to determine in a timely manner which cases warrant more detailed scrutiny.*"[50]

Given the existing UK system would remain a system of voluntary merger notification in relation to every other industrial sector, it is arguable that this proposal might be disproportionate and would, if anything, create a degree of legal uncertainty. Perhaps mindful of the inherent risks in adopting such an approach, the CMA has followed up very recently on the findings of the *Furman Report* by noting that it is considering whether there is a policy justification for the introduction of a separate merger regime altogether for digital companies designated of holding Strategic Market Status. According to the CMA, its current thinking is described as "*any special regime [that] would have its own jurisdictional and substantive tests*". This would involve

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[47] Refer to *Credit Suisse Securities (USA) LLC v Billing* 2007 SCC OnLine US SC 59 : 168 L Ed 2d 145 : 551 US 264 (2007); *Verizon Communications Inc v Law Offices of Curtis V Trinko, LLP* 2004 SCC OnLine US SC 2 : 157 L Ed 2d 823 : 540 US 398 (2004); *Pacific Bell Telephone Co v Linkline Communications, Inc* 2009 SCC OnLine US SC 21 : 172 L Ed 2d 836 : 555 US 438 (2009).

[48] As, for example, the Office of Communications in the UK or the Hellenic Telecommunications and Post Commission in Greece, in relation to telecommunications sector matters.

[49] For example, Stigler Center for the Study of the Economy and the State (n 1) 112 notes that the merger review process in the digital market needs to progress rapidly, and that the Digital Authority, as opposed to the DoJ and the FTC, will need a simple and efficient merger review process so that businesses can move forward without undue delay (and the agency does not need to expend more resources than is necessary).

[50] Furman and others (n 1) 12.

all firms designated with such a status in the digital sector being required to notify all of their transactions to the CMA, subject to certain limited exceptions. While the substantive test of review would continue to be that of the "substantial lessening of competition" test, the rationale for the CMA's proposal is that "*the increased risks of consumer harm may justify the use of a more cautious standard of proof. The regime could also accommodate a separate assessment of non-competition concerns such as data protection*".[51]

In order to justify such exceptional treatment, all of the proposals for reform discussed above which rely on a mandatory filing requirement pre-suppose the existence of a list of designated firms that possess certain pre-defined qualities. Given the long-standing precedent under EU law which upholds that no individual finding of dominance shall be binding for future investigations,[52] it is difficult to endorse a mandatory filing obligation based on the identity of specific firms, at the very least unless those listed firms have the ability to challenge periodically (*e.g.*, every three to five years) their designation as a firm with either "Bottleneck Power", "Strategic Market Status" or that of a "Large Digital Platform". While the OECD is no doubt justified in concluding that such obligations would be aligned to the notion under EU law that dominant firms are subject to "special obligations",[53] it would also be wise to bear in mind that the doctrine of "special responsibility" under EU competition rules applies to the substantive assessment of the legality of dominant firm *behaviour* in the marketplace,[54] rather than as a jurisdictional threshold which justifies review of the mere *existence* of dominance in the digital sector to the exclusion of all other industrial sectors.

VI. EU Referral System

Within the EU, the proponents of a transaction value test as the appropriate trigger for merger review assume that digital sector transactions falling outside the scope of the *EU Merger Regulation* will otherwise only be capable of being reviewed by individual Member State merger review agencies (if at all), especially given the fact that many digital platforms and ecosystems have a

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[51] Refer to Competition & Markets Authority, 'Call for Information: Digital Markets Taskforce' (1 July 2020) 20 <https://assets.publishing.service.gov.uk/media/5efc5e433a6f4023c77a135c/Call_for_information_July2020.pdf> accessed.

[52] See Joined Cases T-125/97 and T-127/97 *The Coca-Cola Company and Coca-Cola Enterprises Inc v Commissionof the European Communities* [2000] ECR II-01733.

[53] OECD, 'Start-ups, Killer Acquisitions and Merger Control' (n 6)41.

[54] Refer to Peter Alexiadis and Alexandre de Streel, 'Designing an EU Intervention Standard for Digital Platforms' (2020) EUI Working Paper RSCAS 2020/14 <https://cadmus.eui.eu/bitstream/handle/1814/66307/RSCAS%202020_14.pdf?sequence=1&isAllowed=y> accessed.

truly international dimension. However, this position reflects an over-simplification of the mechanics of the *EU Merger Regulation* and the types of transactions that can be reviewed by the Commission under that Regulation.

A unique aspect of the EU legal framework for the review of mergers is the one-stop-shop rule, which involves the exclusive exercise of power by the Commission in the assessment of large mergers that are deemed to have a "Community dimension" because of the turnover generated by the respective parties to the merger.[55] This means that an individual Member State's merger review agency is not permitted to review a merger with such a Community dimension unless it affects distinct sub-national markets which those National Authorities are uniquely placed to assess.[56] However, a very important exception to this "one-stop-shop" principle of merger review lies in the fact that, if the two alternative threshold EU revenue tests are not satisfied, a merger which qualifies for notification in at least three Member States can be 'referred up' to the Commission for review, at least to the extent that none of the Member States affected object to such a referral.[57]

As a result of the 'referral up' system, for example, a number of high profile digital markets cases that would have otherwise escaped EU level scrutiny have already been assessed by the European Commission, most notably in *Google/Double Click*,[58] *Facebook/WhatsApp*[59] *and Apple/Shazam*.[60] Given the existence of market share notification tests in Spain and Portugal,[61] the 'share of supply' test in the UK (as it applies prior to the UK leaving the EU),[62] and more recently the transaction value tests introduced in Germany and

[55] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1 (EU Merger Regulation), art 1(2) establishing the turnover test and art 21(3) establishing the principle of exclusive jurisdiction.

[56] See EU Merger Regulation, arts 4(4) and 9(3).

[57] See EU Merger Regulation, art 4(5). The request for such a referral is made to the Commission by the notifying parties, rather than being initiated by the Commission itself.

[58] Referral upon a request by the notifying parties under EU Merger Regulation, art 4(5); *Google/Doubleclick* (Case COMP/M.4731) [2008]OJ C184/10.

[59] Referral upon a request by the notifying parties under EU Merger Regulation, art 4(5); *Facebook/WhatsApp* (Case COMP/M.7217) [2014].

[60] Referral by the Austrian Competition Authority; referral request joined by the National Competition Authorities of France, Iceland, Italy, Norway, Spain and Sweden; *Apple/Shazam* (Case M.8788) [2018] OJ C417/4. To this end, Commissioner Vestager has indicated in her recent speech that the Commission is planning to put a new policy into effect in 2021, with the aim of further encouraging National Competition Authorities to refer more mergers to the Commission in accordance with its modified enforcement priorities <https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en> accessed.

[61] The market share threshold is 30% in Spain (see Spanish Competition Act 2007) and 50% in Portugal (see the Portuguese Competition Act 2012, art 37(1)).

[62] Refer to the UK Enterprise Act 2002, s 23.

Austria (or even the usual relatively low turnover-based notification thresholds that would otherwise apply in those jurisdictions),[63] there are a number of EU Member States which provide a strong basis for the application of a 'referral up' procedure to the Commission in many digital sector mergers. The vast bulk of transactions that cannot satisfy such notification criteria must surely be relatively minor in terms of their market impact. Having said that, there are also a number of other high profile digital services mergers which have not triggered three Member State filing obligations, thereby either avoiding review altogether at national level or being subject only to a handful of national merger reviews (*e.g.*, the *Facebook/Instagram* and *Google/Waze* mergers, both of which were reviewed in the UK).[64]

The scheduled departure of the UK from the EU by the end of 2020 as a result of 'Brexit'[65] arguably provides the EU with a unique opportunity to lower the key turnover thresholds for mergers with a Community dimension[66] and, in the process, allows the European Commission to review a greater number of mergers that might be subject to the 'referral up' procedure. Given that the opportunity to re-calibrate EU merger filing thresholds may soon be available to EU competition policy makers, a major by-product of that process may be that an even larger number of digital sector mergers may become subject to the "referral up" procedure.[67]

At first glance, a growth in national transaction value tests and market share tests will inevitably raise the average level of cases that might become subject to merger review by numerous Member States. One could also imagine, however, that the widespread adoption of a 'share of supply' test at Member State level, rather than a more broadly based market share test, would inevitably catch many more digital mergers that might be capable of raising competition law issues despite falling short of revenue-based filing

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63 For Austria, refer to the Austrian Competition Act 2017, s 9(4)

64 See UK Office of Fair Trading Case ME/5525/12 *Facebook/Instagram* [2012] and UK Office of Fair Trading Case ME/6167/13 *Google/Waze* [2013], as notable examples which escaped the Commission's scrutiny but which were reviewed under UK merger control rules by the Office of Fair Trading pursuant to the 'share of supply test'.

65 For all relevant updates regarding the Brexit process, refer to the website of the Department for Exiting the European Union <https://www.gov.uk/government/organisations/department-for-exiting-the-european-union> accessed. For an overview of the process on competition law, see European Commission, 'Notice to Stakeholders: Withdrawal of the United Kingdom and EU Competition Law' (25 March 2019) <https://ec.europa.eu/info/sites/info/files/eu-competition-law_en.pdf> accessed.

66 This is inevitable, given the fact that the UK has historically been a major jurisdiction for the allocation of the EU turnover.

67 See Vestager, 'Keeping the EU Competitive in a Green and Digital World' (March 2020) <https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/keeping-eu-competitive-green-and-digital-world_en> accessed.

tests. Focusing on the existence of market power in relation to narrow product ranges that make up a 'share of supply' of a particular product or service, rather than conducting a much more complex antitrust 'markets' analysis, would arguably not only be a more straightforward exercise for jurisdictional purposes[68] but would also be likely to result in more national merger thresholds being satisfied. This would, in turn, exponentially increase the number of national jurisdictions affected by the proposed merger. Insofar as a proposed digital merger does not satisfy such lower jurisdictional thresholds, it is arguable that it would more likely than not be of such minor importance that it would be of relatively minor importance which would arguably not justify competition concerns being addressed at the Community level.

VII. Residual Powers of Review

Another alternative proposal that has been put forward by policymakers to address the anti-competitive implications arising from digital mergers that fall below the *EU Merger Regulation* revenue thresholds is to allow competition agencies to intervene *ex post* against those merged entities in order to address competition problems arising from the merger. Most notably, France has launched a series of proposals for reform which contemplate the use of an additional *ex post* power of review for those transactions which satisfy a minimum level of turnover, where the merger is likely to result in competition concerns and where it does not fall within the jurisdiction of the Commission.[69] Flexible powers of *ex post* intervention already exist under various prescriptions in EEA national jurisdictions as diverse as Sweden, Norway, Hungary, Ireland, Estonia, and Lithuania.[70]

Outside the EU, the Japanese Fair Trade Commission (the "JFTC") has residual authority to conduct necessary investigations into transactions that might not satisfy the mandatory notification tests and is able to issue cease and desist orders where the merger raises competition terms. For example, the 2019 deal involving M3/Nihan Ultmarc, which sought to integrate the

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[68] The markets definition exercise is notoriously difficult in substantive merger review proceedings, yet alone at the jurisdictional level where the decision as to whether or not a filing is necessary is a threshold issue. Accordingly, by relying on a 'share of supply' test, one could rely on the objective characteristics of the acquired products or services in question, rather than conducting a complex substitutability analysis involving the application of the Hypothetical Monopolist (SNNIP) test.

[69] Refer to Autorité de la Concurrence's contribution to the debate on competition policy and digital challenges in OECD, 'Start-ups, Killer Acquisitions and Merger Control – Note by France (9 June 2020) <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2020)16&docLanguage=En> accessed.

[70] ibid 7.

various medical data and web services that were in the hands of the respective merging platforms, came to be reviewed by the JFTC when it came to the Authority's attention that the merger might be capable of substantially restricting competition in the market.[71]

Of course, the danger in using such residual powers of review is that they not only act as a major departure from the legal certainty of merger control practice, but also create a category of *ex post* intervention which is radically different from the legal basis and philosophy underpinning Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU"). Of course, there is existing precedent to the effect that, in extreme situations, Article 102 TFEU (and, presumably, its national equivalents) can be used to address abuses of dominance where the theory of harm could not be adequately addressed under the auspices of the merger review process.[72] Having said that, the most recent trend of EU merger decision-making suggests that the Commission will be reluctant to accept that a potential use of Article 102 provides an effective basis upon which to grant clearance to a problematic merger. Moreover, the use of Article 102 legal redress is clearly predicated upon the *abuse* of a dominant market position, rather than on the mere *existence* of dominance that might lead to abusive behaviour.[73]

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[71] Refer to OECD, 'Start-ups, Killer Acquisitions and Merger Control – Note by Japan' (2 June 2020) 6 <https://one.oecd.org/document/DAF/COMP/WD(2020)18/en/pdf> accessed.

[72] See Case T-51/89 *Tetra Pak Rausing SA v Commission of the European Communities* [1990] ECR II-41, paras 1-8, where the Court of First Instance stated that "*the acquisition by an undertaking in a dominant position of an exclusive patent license for a new industrial process constitutes an abuse of a dominant position where it has the effect of strengthening the undertaking's already very considerable dominance of a market where very little competition is found and or preventing, or at least considerably delaying, the entry of a new competitor in that market, since it has the practical effect of precluding all competition in the relevant market*". In this particular case, however, the circumstances were relatively unique insofar as the competition concern stemmed from the uniqueness of the technology which rested in the hands of only one party in the market. Thus, the acquisition in effect changed monopolists, but the transaction did not arguably change the commercial incentives of the monopoly IP holder, which remained the same post and re-acquisition. Thus, Article 102 was in this situation deemed to be an appropriate *ex post* tool with which to deal with a change in commercial incentives that might result in anti-competitive conduct that was not associated with the acquisition, and also because the most complex threshold issue – the proof of the existence of a dominant position – was uncontroversial. Policy makers will rarely be confronted with such a clear legal alternative, especially given that many digital platforms might not be clearly dominant in a discernible relevant product market.

[73] It is not unlawful for a firm to have a dominant position, but what is prohibited is the abuse of that dominant position. See Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-00527, para 24, where in the Court of Justice stated that, "(...) *Article 102 TFEU does not prohibit an undertaking from acquiring, on its own merits, the dominant position in a market*". By contrast, the powers vested in the European Commission under art 106 TFEU allow it to take action against State monopolies or those undertakings granted 'special or exclusive rights' that would render them susceptible to exploiting

Possible changes in EU competition policy which are foreshadowed by the end of 2020 may in fact render any recourse to an *ex post* review mechanism unnecessary. In a recently held stakeholder consultation process, the Commission has considered the possibility of a New Competition Tool being created for policy enforcement purposes which would be directed primarily at addressing the sorts of market failures usually associated with digital service markets characterised by the existence of "digital gatekeepers".[74] The enforcement experience of the Commission in both antitrust and merger cases has left open questions regarding the fitness of existing competition rules to identify and address certain structural competition problems. The most pressing competition problems that have been widely perceived to occur in digital or digitally-enabled markets are seen to be capable of being addressed by new Competition Tools that would complement the Commission's other June 2020 initiative relating to platform-specific *ex ante* regulation.[75]

The first of the New Competition Tool options would seek to address competition concerns arising from unilateral conduct by dominant firms in digitally-enabled markets, without the need to adopt an infringement decision pursuant to Article 102 TFEU. The goal of this tool would be to allow the Commission, working in close cooperation with the National Competition Authorities, to identify competition problems and to intervene before a dominant firm can foreclose its competitors directly or by raising their costs of doing business over time. The second limb of the tool would focus on structural competition problems, where certain characteristics of digital markets such as network and scale effects, the lack of multi-homing and the existence of lock-in effects, the accumulation and lock-in of access to data, and the increased potential for tacit collusion due to algorithm-based technological solutions, create threats to the competitive process. This would enable the Commission to impose behavioural and, where appropriate, structural remedies. However, under such a regime, the Commission would not make any finding that an infringement of EU competition rules has occurred, nor

those rights by virtue of their uniquely held position in the marketplace. See, for example, Case C-553/12 P *European Commission v Dimosia Epicheirisi Ilektrismou AE (DEI),* HellenicRepublic*, Energeiaki Thessalonikis AE, Elliniki Energeia kai Anaptyxi AE* [2014] OJ C315/6.

[74] For details of the consultation and the proposed New Competition Tools, refer to 'Single Market – New Complementary Tool to Strengthen Competition Enforcement' <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool> accessed . Feedback period for interested parties closed on 8 September 2020 and the Commission is predicted to confirm its adoption by the end of 2020.

[75] Refer to 'Digital Services Act Package - Ex Ante Regulatory Instrument of Very Large Online Platforms Acting as Gatekeepers' <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers> accessed .

would it need to impose fines capable of generating legal rights for private parties to launch damages claims. While the precise legislative design of these variants of the New Competition Tool and the Commission's potential new powers in relation to the exercise of such powers remain as yet unspecified, the Commission opened its public consultation regarding the proposed measures in early June 2020.[76] In line with the general objective of ensuring fair and undistorted competition in the internal market, the legal basis of such a new tool would be Article 103 TFEU, applied in combination with Article 114 TFEU.

In focusing on structural risks to competition, the Commission's motivation behind this initiative is to allow it to be in a position to address the pan-European business models of many market players, along with the cross-border nature of digital or digitally-enabled products and services in light of increasing consolidation, which arguably cannot be addressed adequately by interventions at a national level. It has to be asked, therefore, whether fundamental changes need to be made to the jurisdictional thresholds set forth in the *EU Merger Regulation* if indeed some of these proposals for reform being considered under the New Competition Tool regime are to be implemented in the foreseeable future. By having recourse to a new range of *ex post* powers (and possibly also complementary ex ante powers under the proposed new *Digital Services Act* proposal) which are not predicated upon the finding of dominance or an act of strategic abusive behaviour, it becomes clear that a number of errors of assessment that might have occurred in theory in the process of merger review could in principle be corrected at a later point in time if in fact digital markets have been foreclosed to competitors or where those markets have 'tipped' in favour of the leading firm because of structural features of the market. This is especially the case where those market implications are not clear at the time of the review of the merger.

Finally, thought might be given to whether the residual power of review at EU level need only reflect the situation that existed under the case-law prior to the enactment of the *EU Merger Regulation*. Under existing case-law, Articles 101 and 102 TFEU were seen to apply at the time respectively to minority shareholdings in competitors which could result in potential collusive effects[77] or where the merger might lead to the creation of a position

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[76] 'Single Market–New Complementary Tool to Strengthen Competition Enforcement' <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool> accessed .

[77] Joined Cases 142 and 156/84 *British American Tobacco Co Ltd v Commission of the European Communities* [1987] ECR 04487.

of market dominance.[78] This possibility of this type of intervention has also recently been explored in the US by the FTC in relation to potential enforcement action that might be available under Section 2 of the *Sherman Act*.[79]

The use of behavioural tools such as Articles 101 and 102 TFEU is not without merit, especially as regards the use of Article 101 in the context of claims of tacit collusion in the wake of minority stakes in competitors. This makes a lot of sense from a policy perspective, given that it is only the acquisition of 'control' (i.e., something of much greater significance than a minority stake) that can trigger a merger filing obligation. The perspective under Article 102 is somewhat different, however, given that the genesis of the *EU Merger Regulation* was to address mergers that led to the creation or reinforcement of a position of market dominance through the fusion of previously independent firms. If that exclusive jurisdiction is undermined by the exercise of a parallel legal instrument that can address anew the impact of market power flowing from the same merger which has already been reviewed the merger in question, it may undermine much of the legal certainty generated by the adoption of the Regulation. Conversely, while the use of Article 102 route may not be without merit if the merger has not been subject to any form of effective merger review scrutiny in the past, that is an unlikely scenario for any deal with a major impact on an economy, given the range of national merger control rules now in place. Moreover, insofar as the EU endorses the use of a new Competition Tool (see above), the need for an overarching use of Article 102 TFEU in such cases seems both duplicative and excessively onerous on industry.

VIII. Substantive Standards of Review

Having determined that a new merger review threshold might be introduced to catch digital sector mergers that might otherwise escape from existing jurisdictional tests , the question has been asked whether the existing legal standards of merger review continue to be appropriate or adequate in addressing the types of competition law concerns that may arise from such mergers. The prevailing legal standard of review in most jurisdictions around the world is whether the transaction is capable of resulting in a Substantial Impediment

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[78] Refer to Case 6-72 *Europemballage Corpn and Continental Can Co Inc v Commission of the European Communities* [1973] ECR 00215.

[79] Refer to Federal Trade Commission, 'Competition in Digital Technology Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms' (24 September 2019) <https://www.ftc.gov/system/files/documents/public_statements/1545208/p180101_testimony_-_acquisitions_of_nascent_or_potential_competitors_by_digital_platforms.pdf> accessed.

of Effective Competition (the so-called 'SIEC' test).[80] According to the application of that legal standard of review in the EU, the compatibility of a notified merger with the common market is assessed by reference to a much wider point of reference than one of whether the merger creates or strengthens a dominant position. As such, it enables the European Commission to focus on wider market equilibrium effects of the proposed merger. In doing so, the SIEC standard ensures that the non-coordinated effects of mergers in oligopolistic markets can be reviewed, especially those that lie in the 'gap' between single firm dominance and collective dominance.[81] Increasingly, the SIEC test is being used in relation to vertical mergers where the post-merger changes affect the bargaining power of competitors and customers, rather than the scale of the market share change post-merger.[82]

However, the application of the SIEC test also gets very close to endorsing a 'balance of probabilities' approach. In the eyes of the OECD, this has the tendency to introduce a systemic bias *against* the challenge of mergers that are expected to result in anti-competitive effects. This is particularly relevant to the acquisition of nascent digital market actors, because the probability of harm from such "killer" acquisitions is less likely to be clearly established.[83]

When assessing whether the SIEC standard is an effective basis upon which merger review agencies can conduct their merger analysis in more complex digital markets, the prevailing questions focus primarily on the following issues:

- whether the application of the SIEC test is sufficiently robust to be capable of addressing the sorts of issues raised in digital mergers or whether it is best replaced by a standard of review based on a "**balance of harms**";
- whether key aspects of the **burden of proof** should be modified or reversed and/or whether certain **rebuttable presumptions of harm** should be introduced in order to facilitate the decision-making process; and

[80] EU Merger Regulation, art 2(3). The more traditional standard has historically been that of whether a transaction created or reinforced a position of market dominance.

[81] Refer to Recital 25 of the EU Merger Regulation. Refer also to Lars-Hendrik Roller and Miguel de la Mano, 'The Impact of the New Substantive Test in European Merger Control' (2006) 2(1) European Competition Journal 9.

[82] For example, see recent *Telia Company/Bonnier Broadcasting Holding* (Case M.9064) [2019] OJ C160/6.

[83] Refer to OECD, 'Start-ups, Killer Acquisitions and Merger Control' (n 6) 37-38.

- whether certain more novel **theories of harm** need to be further explored in order to generate a climate of effective review in relation to digital sector mergers.

In analysing these issues, there is growing consensus in the eyes of policymakers around the world on one especially important public policy background issue; namely, in relation to digital sector mergers it is preferable to make an error in being over-zealous in the prohibition of mergers than in being overly-cautious by not censuring them.[84]

IX. Balance of Harms Test

Most strident in its views that the SIEC test is no longer "fit for purpose" is the UK's *Furman Report*, which advocates strongly that its competition agency, the CMA, should replace the usual analysis based on the SIEC test and should be allowed to rely on a "balance of harms" test.[85] According to *Furman*, the application of a "balance of harms" test would involve:"*Legislation to allow the CMA to use a 'balance of harms' approach which takes into account the scale as well as the likelihood of harm in merger cases involving potential competition and harm to innovation*".[86]

Such a test would differ from the application of the SIEC test insofar as it would take into account *the scale of the harm and the benefits* to be accounted for alongside their likelihood of occurring. Currently, merger assessments only consider how likely a merger is to reduce competition. In the case of nascent acquisitions, this can constitute a crucial gap in enforcement capabilities. If the fledgling company would have otherwise become a serious and innovative competitor to its acquirer, the scale of the resulting competition would in principle generate far greater consumer benefits than the efficiency benefits derived from the merger itself. The alleged shortcomings of the SIEC approach were considered in the findings of a study

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[84] According to the Stigler Center for the Study of the Economy and the State (n 1), the risks raised by under enforcement are far greater in the digital markets context because the risk of enduring market power in the hands of digital platforms is enduring (refer to p 94). Refer also to OECD, 'Start-ups, Killer Acquisitions and Merger Control' (n 6) 33; Argentesi and others, 'Ex-post Assessment of Merger Control Decisions in Digital Markets' (n 1) 65; Charley Connor, 'Focus on Merger Control to Combat Big Tech, Enforcers Urge' (Global Competition Review, 3 March 2020) <https://globalcompetitionreview.com/article/1215869/focus-on-merger-control-to-combat-big-tech-enforcers-urge> accessed.

[85] Refer to Furman and others (n 1) 13. Refer also to the Italian position which, while proposing that the standard of evaluation be changed, provides no specific recommendations in this regard <https://antitrustdigest.net/italys-big-data-report/> accessed.

[86] ibid.

conducted by the Lear Group for the CMA in 2019,[87] which conducted an *ex post* review of digital mergers. According to that study, market evidence could be identified which supported the view that certain fledgling digital actors had witnessed very significant and rapid growth in their operations post-merger.[88] In stark contrast, even when identifying the theories of harm that might attach to the transactions in which those parties were involved, the competition agencies were unable to adduce compelling evidence as to the certainty of that commercial growth when applying the SIEC test.[89]

Accordingly, concludes the *Furman Report*, merger enforcement in the digital sector would be enhanced by the adoption of a balance of harms approach, which would allow a merger agency to establish a counterfactual scenario[90] against other potential counterfactual scenarios in determining the likelihood of potential harm that might be generated by the digital merger under review.[91] Indeed, there is some evidence that the CMA has already endorsed aspects of the balance of harms approach in its recent administrative practice.[92]

The OECD has expressed its qualified support for the view that an approach based on the balance of harms might be more advantageous in vetting digital sector mergers, while at the same time recognising the difficulties inherent in adopting such an approach.[93] Thus, while an approach based on the balance of probabilities would clearly be a more desirable legal standard from the viewpoint of industry, and from the perspective of achieving legal certainty more generally, greater clarity in the application of a "balance of harms test" could arguably be achieved if merger agencies were able to set out transparently the probabilities attached by them to *each recognisable set of counterfactuals* that have arisen in their assessment of the facts.[94] In the view of the OECD, the benefits of such an approach rest in the ability of

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[87] ibid.

[88] ibid 118; analysing, *inter alia*, the mergers of *Facebook/Instagram* and *Google/Waze*. The companies also witnessed constant and significant growth in the years leading up to the merger, had promising business models, and plans for an expansion that might have increased their relevance in the markets where their acquirers were active.

[89] ibid; emphasising that the CMA dismissed such evidence mostly due to the uncertainty surrounding whether Instagram's and Waze's potential growth would have been realised. Similarly, the authority rejected such evidence in its recent clearance in ME/6886/20 *Visa/Plaid* [2020].

[90] A counterfactual scenario is one in which the market situation absent the merger is compared to the market situation that is likely to be generated by the merger.

[91] Furman and others (n 1) 99-100.

[92] See, for example, CMA ME/6743/18 *Experian/ClearScore* [2019]; CMA ME/6760/18 *Top Cashback/Quidco* [2019].

[93] OECD, 'Start-ups, Killer Acquisitions and Merger Control' (n 6) 37-38.

[94] ibid 38.

a merger agency to be able to select a counterfactual scenario on the basis of the best evidence available, while acknowledging that there might be multiple possible counterfactual events that could flow from the facts under examination.

By doing so, a merger agency would be less prone to default to an overly cautious position and inaction where the evidence is ambiguous. This could help to avoid the ongoing challenges posed by the perceived level of under-enforcement that is alleged to be occurring in the digital sector. However, the OECD warns that, in those situations where the evidence upon which to form an expectation of the counterfactual is relatively thin, it may be difficult in practice to choose between which counterfactual situation should prevail. As a practical matter, this will render the agency's decision vulnerable to challenge before a court of appeal.[95] Having said that, the OECD's overall position is that merger agencies should not shy away from such decisions as they will be important in delineating the outer limits of those mergers which are permissible when compared to those which should be prohibited.[96] For its part, the *Cremer Report* takes the view that, despite its evidentiary shortcomings in complex and shifting digital markets, the SIEC test remains a sound basis upon which to continue merger enforcement in the digital sector. While acknowledging that a gap does exist in implementing accepted theories of harm in the context of digital sector mergers, the *Cremer Report* nevertheless takes the view that:

> *"[C]ompetition law should try to translate general insights about error costs into legal tests. The specific characteristics of many digital markets have arguably changed the balance of error cost and implementation costs, such as that some modifications of the established tests, including allocation of the definition of the standard of proof."*[97]

The *Cremer Report* concludes by supporting the traditional legal standards used by agencies to review horizontal mergers, while at the same time placing greater emphasis on potential constraints within the technological 'space' or 'ecosystem' of the acquirer. After having determined whether or not competitive harm is likely to follow in the relevant space or ecosystem from the planned acquisition, one can then turn to whether the merging parties can discharge the burden of proof in proving that the proposed merger

[95] An appeal judge is unlikely to be impressed, for example, if the counterfactual scenarios being considered by the merger agency cross the spectrum of "no impact on competition" to "severe foreclosure of competitors".

[96] OECD,'Start-ups, Killer Acquisitions and Merger Control' (n 6) 38.

[97] Crémer, de Montjoye and Schweitzer (n 1) 4.

generates efficiencies which outweigh its harmful effects on competition.[98] The approach set forth in *Cremer* seems to emphasise the importance of *potential competition*, but provides few clues as to how compelling the evidence about restrictions to potential competition needs to be.

By contrast, the pre-eminence to be granted to the loss of potential competition has been amplified by the ACCC in such a way as to elevate this level of analysis to a statutory requirement. Thus, the ACCC has proposed:

> "*amending section 50(3) of the Competition and Consumer Act 2010 to specifically include in the assessment whether a merger has the effect of or likely effect of substantially lessening competition: (a) the likelihood that an acquisition would result in the removal from the market of a potential competitor, and (b) the amount and nature of data which the acquirer would likely have access to as a result of the acquisition.*"[99]

This policy is elaborated upon by the ACCC when explaining in its Report that a systematic policy of acquisitions in light of the recognisable market potential of target firms will be a very material consideration in its deliberations as to whether or not the a theory of harm can be pursued based on whether potential competition is being impeded.[100] Germany has pursued a very similar line of reasoning by focusing on whether the acquirer is putting into effect an overall strategy to acquire on a systematic basis fast-growing companies with a recognisable and considerable potential to become competitors of the acquirer in the future.[101]

Although one can see the obvious merits of adopting a "balance of harms" approach from a merger agency's point of view, it is not without its problems. Unless grounded in strong legal foundations, such a standard of review could find itself significantly compromised because of the expectations imposed by a court of appeal. Within the EU, given the General Court's very recent censure of the European Commission's approach in the *H3/O2*[102] *in applying the SIEC standard to a mobile sector 'gap' case, one would not be stretching the imagination to conclude that the European Courts*

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[98] ibid116.

[99] Australian Competition and Consumer Commission (n 1) 105, Recommendation No 1.

[100] ibid 106.

[101] The German Competition Authority will systematically analyse the digital companies' operations; refer to Sauermann, 'New Merger Control Guidelines for Transaction Value Thresholds in Austria and Germany' (*Competition Policy International*, 26 July 2018) <https://www.competitionpolicyinternational.com/new-merger-control-guidelines-for-transaction-value-thresholds-in-austria-and-germany/> accessed.

[102] Refer to the recent judgment in Case T-399/16 *CK Telecoms UK Investments v Commission* (GC, 28 May 2020).

would not be inclined to allow the Commission unlimited discretion in its choice of counterfactual scenarios. Judges sitting on appeal are unlikely to see much merit in this level of discretion, at least in the absence of very clear legislative foundations to support such a radical shift in administrative decision-making. Moreover, such a policy shift, in light of plans in the EU to introduce a corrective mechanism in the form of a New Competition Tool (see Section III above) may be disproportionate, especially given that the types of concerns supporting such a fundamental procedural change are limited to one sector of the economy.

In this context, it must also be asked whether the adoption of a balance of harms test that goes beyond the scope of digital sector mergers is necessary, given that its application is likely to add further complexity and delay to merger reviews in other sectors of the economy. Given the narrow range of counterfactuals that would be available in more traditional sectors of the economy, the range of options that would need to be considered under a balance of harms approach would prima facie appear to create disproportionate costs from the viewpoints of both agencies and notifying parties. Accordingly, the introduction of such a test might indeed require that it be adopted only where markets (including digital markets) have certain objectively identifiable characteristics which lend themselves to an analysis driven by the balance of harms approach. Even where the application of such a standard might be expressly limited to digital markets, there will be those that are concerned that this standard will permeate into broader merger review standards over time through administrative practice.

X. Shifting Burden of Proof

The shifting of the legal standard from the SIEC test to a more flexible legal standard which favours a merger agency's freedom of action is often aligned in the various international reports to proposed shifts in the standard of proof that is used to establish certain key propositions, often by establishing presumptions about the state of competition which need to be rebutted by the merging parties. This provides an alternative basis by which one can assess problematic mergers.

Currently, there is no presumption of legality or illegality about mergers that is found in the merger review regimes around the globe, including that of the EU. However, it is increasingly felt in some circles that the prevailing legal standards of review result in a situation where it is the merging firms, and not consumers, who enjoy the benefit of the doubt when transactions

are being assessed.[103] Put another way, there is a growing feeling that, while there is a need for an effects-based analysis of mergers, that analysis has often taken place in the past against a conservative premise that mergers that cannot be *confidently* identified as being harmful to consumers should be permitted.[104]

The question therefore arises whether, in the specific circumstances presented by acquisitions of nascent digital firms, the burden of proof should be reversed. In this context, some of the international reports have suggested that instead of imposing an obligation on competition authorities to demonstrate that the merger will have a negative impact on the market before they block the acquisition (or impose remedies), one would impose an obligation on the acquirer to demonstrate the *pro-competitive aspects of its acquisition*, or the lack of competitive harm.

The OECD has expressed the view that the proposal to reverse the burden of proof and to establish a rebuttable presumption is "*perhaps the most important proposal that has emerged from the debate over the acquisition of nascent firms [generally]*".[105] Specifically, the OECD considers that there is "*considerable merit*" in legislating to reverse the burden of proof in defined circumstances such acquisitions of nascent digital players by dominant firms (by creating of rebuttable presumption of anti-competitiveness) or where the acquisition increases the risk of competitive harm in circumstances where a reasonable proportion of the market (*e.g.*, 25%-30%) has been affected.[106]

In the context of the EU, such a proposal was endorsed in July 2020 by the French Parliament under a new draft law which provides for a merger notification obligation to be imposed on so-called "*dominant digital companies*", pursuant to which they need to prove that the acquisition being investigated by the Authority is not likely to harm competition.[107] Notably, the proposal to reverse the burden of proof has been one of the cornerstones of the

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[103] See comments of the Chief Economist of the European Commission, Pierre Régibeau, during Concurrences webinar, Enforcement, Covid and the Aftermath: Some Economic Myth Busting (9 June 2020) <https://www.concurrences.com/en/conferences/webinar-7-enforcement-covid-and-the-aftermath-some-economic-myth-busting-en> accessed.

[104] See, *inter alia*, Marc Bourreau and Alexandre de Streel, 'Big Tech Acquisitions: Competition & Innovation Effects and EU Merger Control' (February 2020) 20 <https://cerre.eu/wp-content/uploads/2020/03/cerre_big_tech_acquisitions_2020.pdf> accessed.

[105] OECD, 'Start-ups, Killer Acquisitions and Merger Control' (n 6) 34.

[106] ibid 2.

[107] Refer to the Proposition de loi n° 302 du Sénat le 5 février 2020 visant à garantir le libre choix du consommateur dans le cyberspace, arts L.430-3 to L.430-3 <http://www.senat.fr/leg/ppl19-302.html> accessed. The draft law was approved by the French Senate on 8 July 2020, pending deliberation before the National Assembly <https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1206450&siteid=190&rdir=1> accessed.

Cremer Report,[108] while also being endorsed by two European Commission former Chief Economists – Professors Valletti and Motta.[109] The *Cremer Report* considers that where an acquisition plausibly forms part of a strategy to remove start-ups by a dominant platform/ecosystem, the notifying parties should bear the burden of demonstrating that the adverse effects on competition are "*offset by merger-specific efficiencies*".[110] The authors of the Report note that such a reform would not create a presumption against the inherent legality of nascent mergers – rather, it would take due account of new business strategies and the competitive risks they raise, and should help to minimise false negatives in a digital setting, the costs of which are particularly high.

A broader consensus on the benefits of the burden of proof being reversed can also be identified outside the EU, particularly in the reports tabled in Australia and the US. The *ACCC Report* notes that:

> "*it may be worthwhile to consider whether a rebuttable presumption should also apply, in some form, to merger cases in Australia. […] [A] bsent clear and convincing evidence put by the merger parties, the starting point for the court is that the acquisition will substantially lessen competition*".[111]

Along similar lines, the *Stigler Report* suggests that:

> "*specific merger regulations should require merging firms to demonstrate that the combination will affirmatively promote competition. This shifting of the burden of proof from the government (to prove harm) to the parties (to prove benefit) will assist the Digital Authority by placing the job of demonstrating efficiencies on the parties, who have a greater ability to know what they are*".[112]

In this regard, the relative importance of the information asymmetries noted by the ACCC has been highlighted by authors such as Bourreau & de Streel, who note that information asymmetries regarding technology and market evolution is probably higher between large high-tech firms and antitrust agencies than in other industries. In such cases, establishing certain

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[108] Crémer, de Montjoye and Schweitzer (n 1) 11.

[109] Tommaso Valleti, 'Tech Giants in the Digital Age' (5 December 2018) 5 <https://ecp.crai.com/wp-content/uploads/2018/12/Tommaso-Valletti-2018.pdf> accessed; Massimo Motta and Martin Peitz, 'Big Tech Mergers' (May 2020) Discussion Paper No 147, 35 <https://www.crctr224.de/en/research-output/discussion-papers/archive/2020/big-tech-mergers-massimo-motta-martin-peitz> accessed.

[110] Crémer, de Montjoye and Schweitzer (n 1) 11.

[111] Australian Competition and Consumer Commission (n 1) 199.

[112] Stigler Center for the Study of the Economy and the State (n 1) 111.

presumptions about the impact of a merger may compel big tech companies to disclose information to the competitor and agencies alike, thereby reducing those information asymmetries.[113]

In the context of the US specifically, the proposals for a reversal of the burden of proof have been highlighted as capable of producing particularly beneficial results.[114] Currently, a structural presumption of illegality exists in the US to the effect that, in certain circumstances, the burden of proof in concentrated markets will be reversed, with the understanding being that mergers in such markets will be likely to be anti-competitive (and should hence be prohibited).[115] The presumption means that a merger which *"produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially, that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."*[116] This structural presumption would be very difficult to apply to acquisitions of nascent rivals with little existing turnover. The proposals to strengthen this presumption, by relying not merely on increments in market concentration, but rather on factors such as a history of nascent acquisitions, would help to further recalibrate decision-making in the digital environment by removing the existing bias in favour of costly under-enforcement in relation to acquisitions of nascent firms.

These proposed shifts in the burden of proof from merger review agencies to the notifying parties may indeed provide a more coherent basis upon which to change current merger regimes, at least where the potential effects of mergers are more problematic. Such a shift makes particular sense where one takes the view that the downsides of over-intervention are less profound in the merger context when compared to antitrust intervention for abusive behaviour. Then again, as has been argued above, the risks of under-enforcement are nowhere near as great in the EU if the corrective mechanisms

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[113] Bourreau and Alexandre de Streel, 'Big Tech Acquisitions: Competition & Innovation Effects and EU Merger Control' (n 104).

[114] Jonathan Baker and others, 'Joint Response to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets' (30 April 2020) <https://equitablegrowth.org/wp-content/uploads/2020/04/Joint-Response-to-the-House-Judiciary-Committee-on-the-State-of-Antitrust-Law-and-Implications-for-Protecting-Competition-in-Digital-Markets.pdf> accessed .

[115] *United States v Philadelphia National Bank* 1963 SCC OnLine US SC 155 : 10 L Ed 2d 915 : 374 US 321 1963.

[116] ibid [363].

proposed under the New Competition Tool consultation are implemented into EU law in early 2021.

At the same time, if such fundamental procedural changes are introduced, it should follow that the appraisal of efficiencies must also be elevated as a genuine analytical step in the merger review process, rather than being treated as an afterthought. For far too long, notifying parties have only resorted to an analysis of efficiencies in practice if and when their merger seemed doomed to prohibition or very intrusive remedies.[117] Perhaps the shift in the areas of proof proposed might achieve the aim of supporting a dialogue on efficiencies at the heart of the merger review process, rather than at its periphery. Finally, whichever evidentiary regime is implemented needs to ensure that it does not unwittingly have a chilling effect on investment in new technologies, while allowing small innovative firms to cash in on their inventions, similar to a number of other industries that rely on licensing practices to generate revenue flows for smaller market players.[118] Beyond these considerations, the issue remains as to whether or not merger review agencies, having accepted that efficiencies might indeed flow from the acquisition of a fledging digital player, have the necessary tools available in order to monitor than the efficiencies have materialized in the post-merger environment.[119]

XI. Alternative Theories of Harm

In their proposals for the application of new legal standards of merger review, perhaps the various international studies have been swayed by the fact that the learning curves in the realm of mergers and behavioural infringements in the digital sector have been so steep that a radical overhaul of existing practice is deemed to be necessary. The adoption of a number of key decisions by the European Commission and their imminent resolution on appeal before

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[117] Although it is clear that economic efficiencies should be an integral part of the Commission's competitive effects analysis, as is explained in Recital (29) of the EU Merger Regulation, "It is possible that the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers [...]". Refer also to Chapter 18 in Alistair Lindsay and Alison Berridge, *The EU Merger Regulation: Substantive Issues* (4th edn, Sweet & Maxwell 2012). In the context of nascent acquisitions, Bourreau and de Streel have concluded that the acquisition of start-ups in both the pharma and the digital sectors has the potential to affect innovation in each respective sector, whether positively or negatively. Refer to Bourreau and Alexandre de Streel, 'Big Tech Acquisitions: Competition & Innovation Effects and EU Merger Control' (n 104).

[118] See Christian Ahlborn, Gerwin Van Gerven and Josh Buckland, *EU Antitrust Chief's Potential Reversal of "Burden of Proof" for Big Tech: Pitfalls and Implications* (*Lexology*, 20 November 2019) <https://www.lexology.com/library/detail.aspx?g=2d7c2789-492f-4c80-8724-0538ced9d96c> accessed.

[119] Crémer, de Montjoye and Schweitzer (n 1) 123.

the General Court over the course of 2020-2021 may mean that many of the complex issues that have arisen in the context of Commission investigations will be resolved in the short term.[120] The resolution of a range of market definition and theory of harm questions at the European Court level may mean that, once the jurisdictional issue has been resolved, the substantive assessment of mergers that are considered to be "killer acquisitions" might proceed along more well understood grounds.

Lying at the heart of any analysis of digital sector mergers is the reality that the traditional unilateral effects and coordinated effects theories which apply to the bulk of mergers in other industrial sectors have a relatively minor role to play in digital environments.[121] Instead, the nature of digital platforms and ecosystems means that the bulk of competition issues arising from mergers in the sector raise much more complicated questions of vertical foreclosure and conglomerate effects, exacerbated in the "killer acquisition" context by the elimination of potential competitors. In the case of Australia (as noted earlier), the relative importance of the elimination of potential competition as a primary concern is enshrined in a proposal for legislative change. In addition, the *ACCC Report* was willing to speculate that, when developing theories of harm, merger review agencies should consider attributing special weight to the effects of data and expertise accumulation, economies of scope and the superior bargaining power of those holding data. In the words of the ACCC, there should be a means by which to factor into the substantive assessment "*the nature and significance of assets, including data and technology, being acquired directly through the body corporate*".[122]

A number of these issues have already been explored in existing administrative European precedents. Thus, anti-competitive effects resulting from network effects and a lack of effective multi-homing,[123] in markets for "attention",[124] the loss of potential competition and the loss of innovation,[125] are

[120] Refer to discussion in Alexiadis and de Streel (n 54) 10-15.

[121] Traditionally, there are two ways in which a merger between competitors can lessen competition and harm consumers, namely: (1) by creating or enhancing the ability of the remaining firms to act in a coordinated way on some competitive dimension (coordinated effects); or (2) by permitting the merged firm to raise prices profitably on its own (unilateral effects).

[122] Refer to Australian Competition and Consumer Commission (n 1) 105.

[123] Loss of competition with network effects and multi-homing was effectively explored by the Commission in *Facebook/WhatsApp* (Case M.7217) [2019] OJ C417/4; *Microsoft/Skype* (Case M.6281) [2011] OJ C341/2; by the UK's Competition and Markets Authority in *Just Eat/Hungryhouse* (ME/6659-16) [2017]; and by the French Autorité de la Concurrence *SeLoger/Logic-Immo* (D No 18-DCC-18)[2018].

[124] Explored by the Commission in *Facebook/WhatsApp* (Case M.7217) [2019] OJ C417/4 and *Microsoft/Linkedin* (Case M.8124) [2016] OJ C388/4.

[125] Explored most notably by the Commission in *Dow/DuPont* (Case M.7932) [2017] OJ C353/9 and in *Bayer/Monsanto* (Case M.8084) [2018] OJ C459/10, where the Commission

all issues which have already been addressed by the Commission and various National Competition Authorities under theories of harm configured around variants of traditional unilateral effects theories. Similarly, foreclosure concerns in conglomerate or vertical mergers have already arisen in the context of analyses of network effects and the lack of effective multi-homing,[126] or in relation to "big data" being used as an essential input with which to compete.[127] By the same token, criticism has been raised by the UK's *Lear Report* against what it alleges to have been the overly conservative approach taken by the CMA in its competitive assessment conducted in such cases as *Facebook/Instagram* and *Google/Waze*.[128]

The development of a robust conglomerate effects theory will arguably capture many of the recurring competitive concerns that arise in digital sector mergers. As noted by the OECD in a recent Report, the industrial product conglomerates of the 1960s-1970s have now been replaced in significance by digital firms operating multi-sided platforms.[129] In the view of the OECD, some digital firms are often capable of generating anti-competitive harm through their bundling and tying practices or through the raising of rivals' costs by obliging them to enter into multiple product and service categories simultaneously (in its broadest terms, an 'envelopment' strategy which raises significant barriers to entry). Theories of harm based on such practices are predicated *inter alia* upon findings of the existence of economies of scale and scope, low marginal costs, network effects, positive feedback loops, and privileged access to essential components such as data or software.[130] Unfortunately, whereas the principles underpinning conglomerate effects theory are clear, their application to digital markets based on existing administrative precedents is anything but straightforward. This is because the public policy choices will be very delicately poised between the positive

developed a theory of harm that the merger would have resulted in reduced incentives to innovate. In doing so, it introduced the language of 'innovation spaces' occurring at the level of *early* R&D efforts, and not solely with respect to well-defined pipeline products. The principle of disrupting innovation is reminiscent of Schumpeter's views about the process of 'creative destruction' creating new business structures.

[126] Notably in *Microsoft/Linkedin* (Case M.8124) [2016] OJ C388/4.

[127] See *Facebook/WhatsApp* (Case M.7217) [2019] OJ C417/4; *Microsoft/Linkedin* (Case M.8124) [2016] OJ C388/4; *Google/DoubleClick* (Case M.4731) [2008] OJ C184/10; *Apple/Shazam* (Case M.8788) [2018] OJ C417/4; *Verizon/Yahoo* (Case M.8180) [2016] OJ C434/7; *Microsoft/Yahoo! Search Business* (Case M.5727) [2010].

[128] Argentesi and others, 'Ex-post Assessment of Merger Control Decisions in Digital Markets' (n 1) 21, where the authors note that the decisions taken in *Facebook/Instagram* and *Google/Waze* may have represented "*missed opportunities for the emergence of challengers to the market incumbents*".

[129] OECD, 'Roundtable on Conglomerate Effects of Mergers: Background Note by the Secretariat' (n 19) 5.

[130] ibid 24.

effects of multi-product offerings on consumer choice, on the one hand, and the risk of foreclosure of competitors, on the other. As such, each merger review in the digital space will turn on its very particular facts and the identification of clear principles of guidance may be elusive.

In turn, vertical merger theory in the EU is in the process of being re-shaped as a result of the introduction over the past few years of Nash bargaining theory alongside vertical foreclosure principles.[131] This process is still very much a "work in progress", but the introduction of bargaining theory into vertical foreclosure analysis is something which will inevitably be expanded over time.[132] Given the tremendous scale and scope of some digital platforms, it is clear that their bargaining power vis-à-vis upstream and downstream digital players will be relatively unique, and will raise many similar theories of harm associated with conglomerate effects. Accordingly, we can expect vertical foreclosure theory to be explored further over time in the digital space. As is the case with conglomerate effects theory, however, the public policy issues are finely balanced because so much consumer welfare is generated in the digital space by the process of vertical integration (especially the avoidance of double marginalisation and the belief that innovation is more quickly delivered in many situations by a vertically integrated firm).[133]

As conglomerate effects and vertical foreclosure theories are developed in the digital space, there is arguably a public policy safety net potentially available to antitrust policymakers in the form of the New Competition Tool (see Section III above), which potentially affords the Commission more enforcement leeway in its application of such theories of harm.

XII. Conclusions

The various proposals put forward in many of the international reports and studies open up the possibility that not only might merger review agencies be able to review more digital markets mergers in the near future (*i.e.*, in the jurisdictional phase) but that, when engaging in merger reviews, the legal

[131] The exploration of this approach arose most clearly in the 2019 reversal of the US Justice Department's Decision to block the merger in *United States v AT&T, Inc* No 18-5214 (DC Cir 2019).

[132] Refer, for example, to the approach of the European Commission in 2019 in *Telia/Bonnier* (Case M.9064) [2019] OJ C160/04.

[133] Most recently, refer to the discussion in the revised 'Vertical Merger Guidelines' (*US Department of Justice & The Federal Trade Commission*, 30 June 2020) <https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf> accessed.

standard of proof relied upon (*i*.e., in the analytical phase) might be relaxed to take into account their economic complexities. While some might characterise the debate about the need for fundamental review of merger regimes as an exercise in a "*solution searching for a problem*",[134] given the ambiguous evidence around whether or not any meaningful consumer harm has occurred as a result of the current legal regime, others feel that change is both necessary and overdue.

With respect to the **jurisdictional** phase, it will be some time before the practical experiences gained in the application of transaction value tests in Germany and Austria provide valuable insights into the viability of introducing such jurisdictional changes for the review of digital sector mergers. In the meantime, it will be increasingly difficult to justify at which level such transaction values should be set, especially where the new jurisdictional standard is to apply across all industrial sectors and the transaction value will not be apportioned in equal ratios across geographic jurisdictions.

By the same token, a policy of designation in advance of specified digital players that will be obliged to notify their mergers – especially if set at a low threshold level – poses clear risks that its results may be arbitrary. Unless such a regime is very carefully administered to allow for shifts in market structure, it threatens to raise a series of legal questions which could undermine its operation. At the very least, any such designation should be linked to a regulatory regime where the same threshold-setting exercise is relied upon, and where periodic review of the relevant designation standard takes place.

More fertile jurisdictional ground is arguably available to the Commission in its review of more digital sector mergers, with the opportunity existing for more mergers to be 'referred up' to Brussels where a number of Member State filing requirements have been satisfied. The reality of the UK leaving the EU by the end of 2020 will inevitably result in a fundamental re-appraisal of existing jurisdictional merger allocation rules across the EU.

Finally, there is every reason to believe that, even in situations where certain digital sector mergers fall between the proverbial cracks of European Commission merger reviews, the possible adoption of a New Competition Tool regime at some stage in early 2021 (which may be reinforced in its effect by the adoption of specific regulatory obligations on digital platform

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[134] Refer to K.C. Limarzi and R.S. Phillips, '"Killer Acquisitions," Big Tech, and Section 2: A Solution in Search of a Problem' [2020] Competition Policy International Antitrust Chronicle<https://www.competitionpolicyinternational.com/category/antitrust-chronicle/antitrust-chronicle-2020/spring-2020-volume-2-number-2/> accessed.

providers) will provide the Commission with the possibility of addressing a range of market failures flowing from such mergers after an appropriate volume of market evidence has been collected. In this way, even on a worst-case scenario that the Commission's analysis of a digital merger has been compromised by a lack of evidence or a lack of jurisdiction over the original transaction, many negative market impacts arising from the merger could in principle be addressed at a later stage.

With respect to the **analytical** phase, the situation is even more complex. Those who advocate the relaxation of the SIEC standard have posited that one of two alternative options be adopted. The first of these is the proposal that a "balance of harms" test be relied upon. While conferring much greater freedom of manoeuvre for merger review agencies, this option would inevitably run into difficulties before appeal courts, unless managed very carefully. Moreover, it might be a legal standard which is unnecessary outside the world of digital markets. The ability of merger review agencies to embrace arguments about the efficiency of a merger as part of such an analysis might, however, be its saving grace, although progress along such lines has been patchy in the administrative practice of the Commission. An interesting aspect of the application of such a 'balance of harms' approach, at least in some quarters, is the emphasis placed on the tendency of large digital firms to engage in "serial acquisitions" of smaller market players. The motivation behind such multiple acquisitions would be linked to the likely counterfactual scenario which is most consistent with multiple acquisitions in related, neighbouring or adjacent digital markets. Arguably a more elegant solution, and one which can be more easily used in relation to mergers in other sectors, is to reverse existing burdens of proof or to create rebuttable presumptions which need to be dispelled by the notifying parties. Statements by the Commission's Chief Economist, Pierre Regibeau, tend to endorse the adoption of such a view.[135] Again, however, the treatment of efficiencies lies at the heart of any appraisal of the reasonableness of such a proposal.

Finally, prior to engaging in radical procedural change, further thought should be given as to how existing theories of harm concerning vertical and conglomerate effects on competition can be adapted to digital markets. Much of the thinking that has recently gone into the adaptation of these approaches opens up the possibility that digital mergers might be capable of being addressed without the need for radical procedural change, … at least just yet.

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[135] For example, refer to interview notes from the *Concurrences 1st International Merger Conference*, 19 February 2020, London.