THE INSUFFICIENCY OF THE TURNOVER THRESHOLD IN MERGER CONTROL IN THE DIGITAL MARKET: THE CASE OF KILLER ACQUISITIONS*

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Abstract *Digital markets, marked by rapid technological progress, network effects, and data-driven competition, pose unique challenges in the context of mergers, particularly killer acquisitions. The conventional turnover threshold in European competition law falls short in capturing the nuances of these markets, neglecting non-price elements like data, innovation, and user engagement. Killer acquisitions strategically target innovative startups, aiming to exploit and eliminate potential disruptors. As these emerging companies lack substantial turnover, they escape scrutiny under the existing European merger regulation. To address this, a more comprehensive approach is needed, revaluating criteria, and incorporating alternative indicators when assessing mergers in digital markets.*

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Key-Words Digital Markets – Killer Acquisitions – Turnover – Quantitative Threshold – Merger Control – European Regulation – Competition Law –Theories of Harm – Startups – Innovation – Digital Platforms

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1. INTRODUCTION

In the dynamic evolution of digital sectors and markets, the role of National Competition Authorities (NCAs) and regulators, particularly the European Commission (Commission), becomes increasingly vital in ensuring effective investigation and control of potentially anticompetitive practices. Consequently, the scrutiny of mergers emerges as a fundamental pillar of competition policy, aimed at fostering a landscape of healthy and fair competition.

However, the Commission encounters heightened challenges when confronted with mergers in digital markets, where the current legal framework, reliant on quantitative criteria such as turnover thresholds under the European Merger Control Regulation (EUMR), struggles to effectively address the intricacies of these transactions.

Digital markets, characterized by innovation, disruption, and rapid growth, often see startups, epitomizing these characteristics, becoming vulnerable merger targets. Their susceptibility arises from frequently falling outside turnover thresholds, thereby evading thorough assessment. It's noteworthy that these startups, often prioritizing long-term innovation over immediate monetization, may exhibit low or negligible turnovers.

In this context, digital markets become fertile ground for killer acquisitions, where incumbents strategically acquire startups to thwart their growth, preventing them from becoming effective competitors with innovative products or services. This phenomenon allows incumbents to bolster their market positions and power without undergoing prior scrutiny, posing challenges to maintaining healthy competition levels, open markets, and safeguarding consumer welfare.

Recognizing the limitations of the existing turnover threshold in overseeing mergers, especially those embodying characteristics of killer acquisitions, a range of proposed and enacted measures accentuates the imperative for a restructured or fortified legal framework. In response to the dynamic evolution of the digital landscape, this imperative arises from the necessity to adapt and fortify the regulatory environment and enhance legal frameworks, to effectively confront the complexities associated with the assessment of mergers, particularly those resembling killer acquisitions, ensuring its resilience and effectiveness in countering anticompetitive effects. Amidst this backdrop, startups, symbolic of innovation and disruption, find themselves increasingly vulnerable, necessitating regulatory flexibility and responsiveness. The trajectory of proposed and implemented measures signals a fundamental shift towards a more resilient legal framework, an indispensable element in nurturing fair and dynamic competition within the ever-changing contours of the digital economy.

2. DIGITAL MARKETS, STARTUPS AND KILLER ACQUISITIONS

The intersection of the digital sector and competition law has recently gained heightened attention due to the unique challenges posed by the digital landscape. The evolution of technology significantly influences the nature of competition, while the surge in startup acquisitions by incumbents has raised concerns, as they have escaped merger control oversight in recent decades.

Digital markets, characterized by platforms facilitating interactions and transactions, pose significant competition-related issues (Falce & Granieiri, 2017:16). The dominance of a few incumbents in platforms, exemplified by high-profile cases involving Facebook and Alphabet[1], suggests potential high entry barriers, market concentration tendencies, and innovation constraints. Current regulatory frameworks prove inadequate in addressing the distinct features of these markets, prompting the emergence of the Digital Services Act (DSA) and the Digital Markets Act (DMA) to ensure fair competition in digital markets.

The existing EUMR and national merger control legislations justify their existence based on the acknowledgment that certain operations within a market can yield anticompetitive effects. Mergers, in particular, stand out for their ability to induce lasting changes in market structures[2]. In digital markets, the impact on innovation becomes a primary concern, especially when mergers, potentially identified as killer acquisitions, escape EUMR control[3], given that innovation emerges as an essential characteristic for promoting economic growth[4].

Although it being true that competition law cannot be concerned–neither consistently nor for the same reasons–with all mergers[5],given that many may

1 It should be noted that acquisitions involving digital incumbents, such as Facebook or Alphabet, which were subject to assessment, were eventually cleared by the Commission.

2 Silva, 2018:1157; European Commission, 2008:4-5.

3 In this sense, the revised Market Definition Notice (revised notice), by the European Commission (OJ C/2024/1645, of 22nd February 2024) acknowledges the significance of innovation and innovative markets, as well as the importance of multisided platforms and digital ecosystems.

4 Holmström *et al.,* 2019:1.

5 Gorjão-Henriques, 2011:625.

display positive effects[6], nevertheless, "*frequent acquisitions by digital conglomerates [...] raise two different concerns for merger control. Firstly, how to identify problematic acquisitions and ensure their notification to competition authorities. Secondly, how to assess whether the merger is indeed a 'killer acquisition' rather than a pro-competitive one*" (Holmström *et al.*, 2019:12).

Killer acquisitions are strategically crafted to eliminate or neutralize potential competitors and their products or services that might directly challenge those developed or marketed by incumbents. The primary objectives include sustaining or amplifying existing market concentration and erecting barriers to entry[7]. Beyond these effects, killer acquisitions empower incumbents to enter new market segments, attract consumers, and access innovative technologies. This conglomerate effect is achieved through the integration of specialized knowledge about specific market niches, databases of loyal customers, and unique value propositions[8].

Exploring the concept of killer acquisitions in the context of potential competition reveals varying interpretations across different sectors and markets, leading to the emergence of terms such as 'zombie, suicide, or reverse acquisitions'[9]. Particularly within the digital sector, killer acquisitions can be defined as strategic manoeuvres aimed at neutralizing emerging competitors, irrespective of whether the target company's innovative project concludes post-acquisition[10]. This definition is grounded in the distinctive features of digital markets, characterized by rapid innovation, robust network effects, data-centric business models, the presence of multi-sided markets, and a notable tendency toward market concentration. In such environments, a few dominant operators control significant market shares, justifying the need to identify and scrutinize killer acquisitions as they pose unique challenges to maintaining competition and innovation.

A common denominator among these acquisitions is the substantial financial investment they entail, irrespective of the acquired firm's negligible turnover[11]. While these acquisitions may yield efficiency gains, they universally exhibit, to varying extents, anticompetitive effects. This underscores

6 Merely as an example, positive effects displayed by mergers can be efficiency gains.

7 OECD, 2020:8.

8 OECD, 2020:2.

9 Lamo, 2019:2.

10 *Ibidem*:§2.

11 Gautier & Lamesch, 2020:2.

the significance of scrutinizing such transactions, considering their potential impact on competition, even when efficiency gains are apparent. As Vestager (2016) emphasizes, these mergers are integral to innovation and have the potential to generate efficiency gains, fostering competition and disrupting existing paradigms in the digital world. However, conventional merger control primarily focuses on static price effects, a less relevant aspect in digital markets where many goods and services, from the consumer's perspective, seemingly incur no cost.

The relatively limited attention afforded to startup acquisitions can be traced to the perception that these companies may not emerge as direct competitors to incumbent firms. Traditional considerations often define potential competitors based on product overlap, a criterion less applicable in digital markets where the emphasis shifts from tangible products to intangible assets and innovative solutions. Consequently, the role of startup acquisitions has been confined to evaluating barriers to entry, market power concentration, or potential abuse of dominant positions.

Yet, with an evolving understanding of digital markets, Crémer et al. (European Commission, 2019) suggest a broader perspective on potential competitors. Companies lacking product overlap but possessing a substantial user base and innovative technologies become viable contenders. These companies, focused on addressing gaps in existing products or services through research and development (R&D), often yield negligible turnovers. Their products or services complement existing ones, making it challenging to discern their true competitive potential using traditional criteria. In this context, startups, rich in intangible assets, become attractive to incumbents, offering a higher probability of acquisitions escaping scrutiny, particularly by regulatory bodies like the Commission.

In addition to the difficulties encountered, the reality of a killer acquisition may vary depending on the sector or market where it occurs. While in the pharmaceutical sector, as defined by Cunningham *et al.* (2021:1), the purpose of these acquisitions is to eliminate competitors, discontinue or eliminate innovation projects, or the products/services of target companies; in the digital sector, the motivation may lie in the desire to obtain the database developed by the target company and the development of its products or services. This is not with the aim of closure but rather integration for the assimilation of vast amounts of data, which may even generate efficiency gains[12]. However,

12 Alexiadis *et al.*, 2020:69.

even though they may differ in their motivations and how they unfold, there is a common aspect of killer acquisitions that cuts across sectors or markets where they take place: the elimination of a potential competitor and prevention of the emergence of future competition (or competitive pressure).

It is crucial to highlight the potential for misinterpreting killer acquisitions, as they may be conflated with exit strategies devised by startups themselves. The intricacies of exit strategies also intertwine with competition-related concerns. When evaluating exit strategies, the emphasis should shift to startups intentions to be acquired by incumbent companies, prompting scrutiny under competition law, distinct from the realm of killer acquisitions. These strategies, crafted to secure financial returns and profits by harnessing synergies between innovation and scalability, pose pertinent questions. Consequently, behaviours associated with potential killer acquisitions may not solely be attributable to incumbent companies but also, or predominantly, to startups and their investors. This complexity introduces the possibility of negative effects within the domain of competition law.

The ongoing debate surrounding killer acquisitions also delves into a pivotal aspect–their inherent nature. Specifically, there is a question of whether killer acquisitions should be categorized as a strategic approach or a distinct type of acquisition or rather a theory of harm. In the realm of mergers, the theories of harm serve as a framework employed by the Commission to evaluate potential anticompetitive effects, facilitating the determination of whether the notified merger could detrimentally impact competition in the internal market, thereby negatively affecting consumers[13]. The selective use of theories of harm allows for pinpointing company behaviours that have adverse effects on competition. In this context, we contend that killer acquisitions should be construed as a distinct category of acquisition, subject to analysis within the framework of existing theories of harm, such as the loss of potential competition. The challenge arises when considering killer acquisitions as a theory of harm, as delineating a clear distinction between this theory and the loss of potential competition may prove to be challenging, if not outright impossible, owing to practical application issues.

Nonetheless, it is important to note that, despite the existence of a considerable volume of acquisitions in these markets and the concern surrounding those involving startups, a killer acquisition has not yet been identified at the European Union (EU) level. We believe that the absence of this identification

13 Zenger & Walker, 2012:209.

is more likely since the relevant reality diverges from traditional criteria and notions. This allows many mergers to evade effective scrutiny, or if not, to receive approval due to the inadequacy of applicable criteria, rather than their actual non-occurrence.

The increasing intersection of the digital sector and competition law has brought forth pressing concerns, notably the surge in startup acquisitions evading merger control as the traditional focus on static price effects in merger control is deemed less relevant in the dynamic realm of digital markets. Scrutinizing startup acquisitions becomes vital as potential competitors may lack product overlap but contribute to innovation and possess substantial user bases. The ongoing debate surrounding killer acquisitions raises questions about their categorization and the need for nuanced scrutiny criteria in the evolving landscape of digital markets.

3. THE (POTENTIAL) EFFECTS OF KILLER ACQUISITIONS

Killer acquisitions, resulting from the intricate features of digital markets such as network effects, innovation, concentration, scalability, and ecosystem integration, have the potential to adversely impact or harm competition and innovation through various channels. The intricacy of both the digital market dynamics and the killer acquisitions themselves contributes to the challenges faced by competent authorities in effectively addressing this reality.

In terms of their (potential) effects, killer acquisitions manifest both horizontal and non-horizontal effects, posing threats by eliminating or diminishing potential competition, stifling innovation (thus limiting consumer choice), fortifying market power, and establishing entry barriers that limit efficiency and the overall dynamics of the relevant markets.

While theoretically, identifying the characteristics and anticompetitive effects of killer acquisitions may seem relatively straightforward, the practical detection and control present formidable challenges[14]. This complexity becomes pronounced when confronted with uncertainties surrounding immediate effects and the need to consider variables in a constant state of flux, such as innovation, prices, and entry barriers. These dynamic factors

14 Although the Commission has been making efforts towards a more comprehensive approach to these issues, with a particular emphasis on assessing the impact of these acquisitions concerning innovation, the challengers have been numerous. This is especially true due to the rapid and constant evolution of digital markets.

compound the complexity of practical analysis in addressing killer acquisitions in digital markets[15].

One of the distinctive features of digital markets, arising from their organization as platforms or multi-sided markets, which significantly impacts the effects of killer acquisitions, is the notable presence of network effects[16] – both direct and indirect in nature. In these markets, different user groups are brought together. Direct network effects occur when the value of a particular product increases for users as more users join the same network. On the other hand, indirect network effects occur when the value increases as more complementary products or services become available. Network effects, whether direct or indirect, tend to create dependence and interdependence among users, complicating potential transitions to adjacent platforms due to costs and obstacles to change. Examples include the transfer of contacts, re-establishment of connections, and learning new interfaces.

The dependence generated by network effects often leads to winner-takes-all or winner-takes-most scenarios, as stronger network effects result in quicker market dominance. This translates into various advantages such as economies of scale, data accumulation, and more network effects. Killer acquisitions, by influencing network effects, can become inflection points with the capacity to harm long-term competition, consequently limiting consumer choice. Therefore, understanding network effects is crucial for authorities since these effects shape the dynamics of competition and market structures in digital markets, especially when directly related to killer acquisitions[17].

Another effect associated with killer acquisitions is the elimination of potential competition. This could result in reduced innovation, limited consumer choice, strengthened market power, leading to the reduction or elimination of potential competition that might have arisen had the acquisition not taken place. As Dasgupta and Stiglitz refer, "*first, potential competition affected the behaviour of incumbent firms. They were induced to engage in faster research, to pre-empt the entry of rivals*" (1988:574-575). On the other hand, these types of acquisitions can create or reinforce barriers to entry for new or potential competitors, which, even with efficiency gains, may lead to a limitation of consumer choice. The lower the competition in a given market,

15 Lamo, 2019:5-6.

16 Martín-Laborda, 2017:1-15.

17 *Ibidem*: §§1-15.

the lesser the incentives for the incumbents to enhance their offerings and implement the benefits that may arise from increased innovation, with negative repercussions for consumers.

In terms of innovation, the effects of killer acquisitions are associated with a potential decrease or elimination thereof, including the elimination of potential competitors. A reduction in the number of innovative competitors may diminish the incentives for incumbents to invest in research and development (R&D) efforts. However, evaluating the impact of killer acquisitions on innovation proves to be a genuine challenge, as these effects do not occur immediately. There may be a varying time lapse until their manifestation, coupled with the fact that they take place in markedly dynamic and constantly evolving markets[18].

Killer acquisitions grant incumbents access to valuable assets like user databases, innovative technologies, products, and intellectual property. This enables them to expand into adjacent market segments (conglomerate effects) or fortify their dominant position within the relevant market. Consequently, such acquisitions may result in data concentration under a single operator, raise privacy concerns, and potentially lead to the abuse of dominant market positions. Recognizing these anticompetitive effects underscores the critical importance of analysing and controlling killer acquisitions. This scrutiny is essential to prevent adverse impacts on competition, innovation, and consumer welfare. Consequently, it serves as an incentive for implementing mechanisms that ensure the protection of these objectives.

In terms of positive effects, benefits can be discerned in the strategic approach taken in a killer acquisition, even as the operation retains its inherent nature. Efficiency gains, synergies, and economies of scale emerge, potentially favouring the incumbent and, by extension, its consumers. This is because the acquisition in question provides access to intellectual property and specific knowledge, expediting innovation and modernization processes. It also facilitates expansion into new markets, fostering competition and innovation. These positive outcomes align with broader digital transformation initiatives, encompassing process modernization, the adoption of digital technologies, and the reformulation of business models.

In specific contexts, the acquisition of startups can contribute to digital transformation, yielding benefits for consumers such as the introduction of innovative products, enhancements in the quality of existing ones, and

18 Bundeskartellamt, 2016:71-80.

potentially more affordable prices. The acquisition grants the incumbent access to specialized skills and knowledge, particularly in data-related aspects. Coupled with their data and know-how, this allows for a more effective utilization of resources compared to the startup itself. This, in turn, can lead to improved decision-making, the implementation of targeted marketing strategies, and the continuous enhancement of the user experience.

In this context, it is imperative for the NCAs and, especially, the Commission to consider the positive effects generated by killer acquisitions. This is because, as stated by Holmström et al. (2018:18), "*if an acquisition is blocked, which otherwise would have created a platform for new products or services when combined with the incumbent's assets, we lose economic efficiency*".

Measuring the impact of a killer acquisition, especially in the future market, can prove to be a challenging task, as various variables are at play, subject to changes over time. These variables may include, among other factors, the analysis of market shares, prices, entry barriers, long-term market effects, impact on innovation, research and development efforts, economic analysis, and the level of sector specialization[19].

Therefore, the evaluation of killer acquisitions requires a case-by-case approach, considering the various effects mentioned (along with others that may arise) to ensure the preservation of competition, innovation, and consumer well-being. Based on the uniqueness of each acquisition, it is imperative to conduct thorough and expedited analyses capable of determining the predominant effects of killer acquisitions in a given case: whether positive or adverse. Even in cases where a certain merger is concluded to be a killer acquisition, the decision to authorize it (or not) should always consider the specific circumstances and the unique dynamics of the market in question.

4. THE INSUFFICIENCY OF THE TURNOVER THRESHOLD

The turnover threshold is the determining factor that dictates application of the EUMR to the assessment of mergers and that determines the allocation of jurisdictional powers over that assessment to the Commission, embodying a distinctly *ex ante* mechanism. Only the mergers that satisfy this threshold will be assessed by the Commission, except in cases of voluntary notification or via the referral mechanism foreseen in the EUMR.

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19 European Commission, 1997.

While the turnover threshold offers a degree of legal certainty, its limitations lie in its narrow focus on accounting aspects, overlooking pivotal factors inherent in digital market mergers, including database control, network effects, and innovation, among others. This constraint raises concerns about the potential exclusion of mergers in digital markets, particularly those involving startups. Such exclusions might inadvertently overlook killer acquisitions, particularly as startups may not generate sufficient turnover to ensure the application of the EUMR[20].

Over the past decades, an intense debate has unfolded, engaging both the academic community and EU institutions, complemented by the initiation of pertinent public consultations aimed at potential reforms within merger control. The focal point of these reform calls has been the notification thresholds for mergers, with a particular emphasis on the perceived insufficiency of the turnover threshold as stipulated in the EUMR. As discussions unfold regarding the efficiency of the current regime, particularly in the context of digital markets, attention has been drawn to the limitation of the current turnover threshold. Notably, there is a recognized challenge in its ability to comprehensively capture and assess mergers that are mainly characterized by added value and innovation orientation. In response to these complexities, proposed solutions underscore the shortfall of current regulatory frameworks and mechanisms in adequately and effectively addressing the distinctive challenges posed by mergers in digital markets, especially those involving startups[21].

In the dynamic landscape of digital markets, mergers, particularly acquisitions, operate on non-fungible or qualitative criteria, diverging from the quantitative nature of turnover. This is evident in scenarios where control extends beyond traditional turnover metrics, encompassing entities with substantial databases despite modest financial turnovers. These companies, while lacking in traditional revenue, wield considerable value when assessed through qualitative criteria such as ownership of extensive data reserves and innovative, disruptive technologies.

This underscores the notion that mergers within these markets can exert profound influences on both market structures and the competitive prowess of startups. The unique characteristics of digital markets and startups introduce a nuanced dimension, where their acquisition by established companies

20 United Nations, 2019:9.

21 Tyagi, 2019:279.

can yield significant impacts on competition[22]. As highlighted by Vestager (2016), "*a merger that involves this sort of company could clearly affect competition, even though the company's turnover might not be high enough to meet our thresholds. So, by looking only at turnover, we might be missing some important deals that we ought to review*"[23].

Digital markets, heavily reliant on robust data collection practices, give rise to heightened concerns regarding privacy, data protection, and the potential for market power abuse. These apprehensions surpass traditional assessments based solely on turnover, demanding a more comprehensive analysis of their repercussions on consumer privacy and the concentration of data. Numerous digital companies adopt business models that prioritize intangible assets over tangible ones, emphasizing elements like user data, algorithms, and intellectual property, and although their turnover is generally low or insignificant, these companies possess high value[24]. For example, the presence of network effects increases the likelihood of profitability emerging long after a product or service captures a substantial portion of the relevant market. This potentially significant time gap renders the turnover-based threshold inadequate for addressing mergers that, despite not meeting this criterion, are potentially anticompetitive.

The transformative impact of digital market dynamics, primarily driven by intangible assets like user data, algorithms, and intellectual property, extends beyond conventional turnover-based evaluations. This shift has profound implications for competition, particularly in fostering innovation, areas that quantitative thresholds, such as turnover, often inadequately capture. Adding complexity, the global reach of digital markets, crossing national borders, necessitates a collaborative approach among relevant entities. Addressing intricate cases involving globally reaching companies and users across multiple jurisdictions becomes imperative.

Within this context, an exclusive focus on turnover by the EURM proves to be insufficient. Such an approach overlooks operations possessing characteristics capable of manifesting adverse effects on market structure and overall competitive landscape. Recognizing the shortcomings of the existing legal framework for merger control at the EU level, especially in adapting to the challenges of the digital economy, is crucial. Despite institutional efforts

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22 OECD – 2020:3.

23 Also in this sense, OECD, 2020:9.

24 Tyagi, 2019:277.

to adjust rules, persistent gaps exist, particularly in notification and jurisdiction rules associated with digital markets. Acknowledging the shortfall of relying solely on turnover constitutes a pivotal step. This recognition is vital for ensuring that merger control effectively safeguards competition and consumers while fostering legal certainty. Such an approach aims to lessen unnecessary burdens for both the involved companies and the overseeing entities, namely the Commission at the EU level[25].

In light of the dynamic and ever-evolving nature of digital markets, it becomes imperative to adapt and enhance the current merger control system to effectively safeguard competition within the internal market. This adaptation may encompass streamlining the analysis of small-scale mergers, with a heightened focus on addressing potential risks associated with killer acquisitions. Additionally, reinforcing international cooperation between competition authorities and relevant entities is crucial for conducting logical and transparent analyses, thereby ensuring legal certainty.

Consequently, there is an undeniable need to deepen the evolution of thresholds, introducing new criteria that consider the nature of assets involved in operations, data accessibility, market dynamics, network effects, and the multilateral nature of platforms in digital markets. This evolution is not only current but also essential for addressing the unique challenges posed by the digital landscape. While optimal solutions may not always be readily available, there is a continuous pursuit of more effective approaches to navigate this new reality. This endeavour aims to maintain an acceptable level of legal certainty for all stakeholders, including companies, Member States, and European institutions.

The insufficiency of the turnover threshold lies in its limitations in adequately capturing market power, contemplating non-monetary parameters, and assessing competition effects specific to digital markets, such as network effects and their multilateral nature. Consequently, emphasizing the necessity of developing new approaches, solutions, and alternative mechanisms for evaluating specific mergers in digital markets, particularly those involving startups, befalls imperative.

25 Vestager, 2016.

5. POTENTIAL SOLUTIONS TO ADDRESS THE CURRENT THRESHOLD GAP

Since the emergence of the debate around the need to reform the current regulatory framework for merger control at the EU level, various authors have proposed different solutions to address the gap left by the current threshold, especially when confronted with mergers in the digital sector and markets.

Given the myriad of proposed solutions, we have strategically narrowed our analysis to focus on three options. We assert that these selected alternatives possess the potential to stimulate a more robust and engaging debate, ultimately playing a pivotal role in crafting a viable solution to address the insufficiency of the existing threshold.

Upon identifying the insufficiency of the current criteria, it becomes crucial to approach potential solutions or mechanisms with caution. The goal is to avoid inadvertently impeding mergers that could genuinely foster pro-competitive outcomes. Striking a delicate balance is paramount to prevent unintended hindrances, as excessive regulation, or control, akin to the anti-competitive conduct of companies, poses a tangible risk of diminishing competition. This underscores the nuanced and careful considerations required in regulatory approaches.

Another aspect to consider in any adopted solution or mechanism is the ability to assess the extent to which efficiency gains resulting from the merger (such as complementarities, cost reductions, or network effects) offset any adverse horizontal, vertical, or other effects. However, conducting such an evaluation may prove challenging due to the inherently *ex ante* nature of the assessment. The impediment of these pro-competitive mergers can also yield adverse effects, potentially discouraging future pro-competitive mergers if the precedent establishes an impression of overly stringent merger control.

Any discourse on whether, in merger control, excessive enforcement is more acceptable than insufficient enforcement should carefully weigh this second-order effect.

5.1. Mandatory notifications: the case of the Digital Markets Act

An alternative strategy suggested to address the turnover threshold gap entails imposing obligations, specifically notification requirements, on companies deemed to wield significant market power, offering a prospective solution to this challenge[26]. In addressing this issue, the Commission has incorporated a

26 Alexiadis *et al.*, 2020:76-80.

similar approach within the framework of the Digital Markets Act (DMA), specifically targeting platforms acting as gatekeepers. Mandated by the DMA, these platforms are obligated to inform the Commission about their planned or completed acquisitions, encompassing both core platform services and other digital sector offerings[27].

In this context, a company will have gatekeeper status if it exercises significant control over access to platforms or digital services essential for other businesses to reach their customers or conduct their operations, and if it has the capacity to establish rules and standards for the use of its platforms, control data flows, and influence the prices and availability of good s and services. Therefore, gatekeeper status is often associated with concerns about competition and access to digital markets. Some gatekeepers may use their market power to harm or eliminate smaller competitors through the adoption of anticompetitive practices, such as favouring their own products or services, using data collection for unfair advantages, among others.

It is noteworthy that a similar solution was advanced by the Furman Report (2019:12), where it was suggested that digital entities attaining a strategic market status – signifying their dominance in a pivotal bottleneck market – should notify the competent authorities of their intentions to acquire potential competitors, enabling the competent authorities to determine whether these acquisition intentions require a more detailed review and assessment.

In alignment with the underlying principles of this mechanism, entities falling under the purview of gatekeeper or strategic market status are required to notify authorities of their plans for acquisitions or mergers. The shared information, as envisaged, is anticipated to adhere to a straightforward and transparent reporting format.

Nevertheless, this approach prompts the inquiry into the nuanced process of determining or articulating the most fitting mechanism for ascertaining whether a specific company possesses substantial market power, occupies the role of a gatekeeper, or attains the status of a strategic market holder. Striking a delicate balance becomes imperative, ensuring that while navigating these

27 The definition of gatekeeper is outlined in the Digital Markets Act (Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2020/1828. It stipulates that the gatekeeper status is granted to an essential platform service provider when (i) it has a significant impact on the internal market; (ii) the services provided constitute a crucial entry point for professional users to reach end-users; and (iii) it holds and entrenched and lasting market position or is expected to acquire such a position in the near future.

considerations, the crucial element of legal certainty is preserved – an indispensable aspect of any mandatory notification regime.

Furthermore, even if the inherent challenges could be navigated with relative ease, it remains crucial to acknowledge that the information necessary for such determinations would invariably originate from the involved company. This introduces a potential risk, as the company may opt to withhold or manipulate information strategically, impeding the pertinent authorities from conducting a substantive preliminary analysis. This analysis is indispensable for ensuring a comprehensive evaluation of the reported potential merger, particularly under the DMA.

Alexiadis et al. emphasize an additional layer of complexity: mandatory notification regimes should (i) be exceptional by nature; and (ii) entail a list of companies that meet the specific criteria (as is w the case under the DMA). However, and according to analysis, these aspects pose a significant challenge when confronted with EU legislation precedents, given that according to these "*no individual finding of a dominant position shall be binding for future investigations*", imposing a periodical challenge to the list of designated companies, perhaps on a three to five-year cycle (2020:76-80), or even less, could potentially result in an excessive workload for the Commission every time a new potential gatekeeper emerges or an existing gatekeeper loses its status.

This heightened workload and constant concern for companies, their stakeholders, and European institutions themselves may impose more constraints than benefits. As the DMA will come into full effect in March 2024, an evaluation is necessary to determine whether this mechanism presents greater benefits regarding mergers in the digital sector or if it further complicates a process intended to be as straightforward as possible, as simplicity is crucial to ensure that anticompetitive operation, such as mergers, do not escape the necessary assessment.

Even if it can be argued that all the above issues can be addressed based on the logic that dominant companies are always subject to special or exceptional obligations, the use of the mere existence of a dominant position in the digital sector as the jurisdictional threshold still raises relevant concerns, and the focus should still pend on the substantive review of the existence of a dominant position, as has been the practice until now[28].

In the context of this issue, and as highlighted by Lamo (2019:13), we posit that this communication mechanism holds significant potential for

28 Alexiadis *et al.*, 2020:76-80.

positive impact, particularly when synergistically integrated with the existing Article 22 of the EUMR and the evolution of ex post mechanisms, regardless of the concerns that may be raised. The integration of mandatory notification and the referral mechanism has the potential to facilitate a more nuanced and comprehensive knowledge of trends within the specified sectors and markets, thereby functioning as a valuable tool in the realm of market investigations.

5.2. Broadening the applications of the referral mechanism under Article 22 of the EUMR

In 2022 the Commission expanded the application of the referral mechanism of Article 22 of the EUMR. In its communication on the application of the referral mechanism outlined in Article 22 of the EUMR to certain categories of cases (2021/C 113/01)[29] the Commission disclosed categories of mergers involving parties with certain characteristics that are subject to referral to the Commission by the NCAs even if they do not meet the thresholds defined the national legislations of the NCAs – including the acquisition of startups where the turnover is not sufficient or sufficiently relevant and not revealing of the true importance and potential of such companies – aiming at ensuring that mergers that may present a significant impact on competition in the internal market are assessed by the Commission.

This expanded application of the EUMR referral mechanism appears to be an attempt to mitigate the turnover threshold gap and to strengthen and expand a mechanism that has proven to be the most effective in enabling the Commission to assess mergers that fall outside the scope of application of the EUMR. The guidelines offer detailed explanations and examples for each category, assisting Member States and market participants in understanding when a case should be referred to the Commission. It emphasizes the need for swift cooperation and information sharing between NCAs and the Commission, in order to ensure the effective application of Article 22 of the EUMR.

The Commission's intentions behind this expanded interpretation of the scope of Article 22 of the EUMR, seem to be one of promoting a consistent application of the referral mechanism across Member States, enhancing legal certainty, and ensuring an efficient and effective application of the community rules on merger control, by allowing this body to assess a significant number or mergers, including those in the technology sector, which

29 European Commission, 2021:1.

would otherwise go unassessed by it. And the Commission justifies this new approach by concluding that the effectiveness of the quantitative thresholds of the EUMR, combined with the referral mechanisms, is generally successful in capturing mergers with a significant impact on competition in the internal market of the EU.

Alongside the Commission, in the Illumina case (C611/22 P)[30] the General Court endorsed this approach of encouragement NCAs to refer mergers to the Commission for potential assessment even if they do not meet the quantitative thresholds under Article 22 of the EUMR. In the context of the Illumina case, an appeal was presented to the Court of Justice of the European Union (CJEU) precisely challenging this decision of the General Court, which is still pending.

While the broadening of the scope of Article 22 of the EUMR may allow for the analysis of relevant transactions that fall outside the framework of the EUMR and of domestic legislations of Member States, it is important to note that it may also give rise to some legal uncertainty given the rather broad and subjective criteria on which it is based, despite the Commission's claims on legal certainty, lacking further development in terms of its criteria as to avoid over burdening the Commission with the assessment of too many mergers, which may give rise to indirect anticompetitive effects.

Nevertheless, the expansion of the referral mechanism combined with the turnover threshold may present an interesting solution to the gap of the turnover threshold, pending a finetuning of the criteria surrounding the new expanded scope of application of the Article 22 of the EUMR.

5.3. Post-merger analysis: the case of Article 21 of the EUMR and Article 102 of the TFEU in the Towercast case law (C-449/21)

In 2023, the CJEU issued a highly significant judgement in the context of the *ex post* assessment of mergers. The focus of the judgment revolved around the potential resort to Article 102 of the TFEU as a mechanism for controlling mergers after their completion, under specific conditions. These conditions include the mergers not having been subjected to any other prior control mechanism, including national legislations and the EUMR.

The case in question (C-449/21) pertained to an acquisition in the digital terrestrial television (DTT) broadcasting sector in France, with Towercast

30 C-611/22 P, *Grail* LLC, ECLI:EU:C:2023:205 (appeal of T-227/21, *Illumina Inc. v European Commission*, ECLI:EU:T:2022:447).

alleging an abuse of dominant position by TDF. Despite the initial rejection of the claims by the French Competition Authority (FCA), Towercast appealed to the CJEU, leading to a preliminary ruling on the application of Article 102 of the TFEU to mergers not previously controlled. In its judgment, the CJEU concluded that the EUMR, while favouring prior or *ex ante* control, does not preclude the subsequent assessment of a merger under Article 102 of the TFUE, provided it has not undergone *ex ante* scrutiny. Thus, the CJEU concluded that mergers not subjected to prior control may be assessed retrospectively considering Article 102 of the TFEU, aiming to ensure a comprehensive control system for mergers that are particularly relevant to competition law. The CJEU's interpretation differs from the stance taken by the FCA and other parties involved, that argued against the direct application of Article 102 of the TFEU, given the existence of a specific merger control instrument, the EUMR.

It is crucial for the discussion to bear in mind that, in accordance with the provisions of Article 102 of the TFEU, the abuse of a dominant position by one or more companies in the internal market (or a substantial part thereof) constitutes an infringement, and as such is prohibited if has the potential to affect trade between Member States. Moreover, if one looks closely at the EUMR, one will find that Paragraph 24 outlines a crucial principle that states that in order to maintain a fair and competitive landscape within the common market, any community-scale mergers that lead to the formation or strengthening of a dominant position, potentially causing substantial hindrance or restriction to competition in the common market, or a significant portion of it, should be considered incompatible with the common market[31].

Consequently, Article 102 of the TFUE enjoys direct effect, and its enforcement is not subject to the prior adoption of procedural regulations, as it confers rights, being the responsibility of national courts to uphold them. Therefore, it is also crucial to emphasize that the abuse of a dominant position is not subject to exemption under any circumstances, with the CJEU determining that the list of practices and conducts outlined in Article 102 of the TFEU is not exhaustive[32], which implies that the forms and practices leading to an abuse of a dominant position are not confined to the enumeration

31 See §24 of the EUMR.

32 For example, the judgments C-333/94 P, *Tetra Pak International SA v Commission*, ECLI:EU:C:1996:436; C-95/04 P, *British Airways plc v Commission*, ECLI:EU:C:2007:166; C-280/08 P, *Deutsche Telekom AG v European Commission*, ECLI:EU:C:2010:603.

within the said article. As such, this behaviour is directly prohibited by the Treaty, and the task of implementing the consequences of such prohibition falls, as appropriate upon the competent national authorities or the Commission, depending on the body competent in a specific case-scenario.

While the guiding principle of the EUMR is its exclusive application to mergers, as stipulated in Article 21(1), the procedural law of Member States is applicable to mergers that do not meet the EU thresholds. Consequently, the EUMR does not preclude a merger from undergoing assessment by NCAs and their respective judicial bodies, which implies the application of Article 102 of the TFEU. In strict terms, the prohibition outlined in Article 102 of the TFEU is sufficiently clear, precise, and unconditional, obviating the need for a provision of derived law expressly authorizing or mandating its application by national authorities or judicial bodies. As such, Article 102 of the TFEU can be invoked concerning a merger that does not surpass the pre-established control thresholds in the EUMR and applicable national laws, provided that the criteria defined in this article for establishing an abuse of dominant position are met.

Particularly, it is incumbent upon the competent authority to assess whether the acquirer, holding a dominant position in a specific market and having gained control of another company in that market through a merger, has significantly restricted competition in the relevant market through its conduct. It is crucial to note that the mere observation of a strengthening of a company's position is insufficient to establish the presence of an abuse, as it is necessary to demonstrate that this increased dominance would lead to a significant restriction of competition.

It is also noteworthy that the position adopted by the CJEU regarding the potential application of Article 102 of the TFEU to mergers that have not undergone prior assessments, serving as a mechanism of *ex post* control, is grounded not only in its interpretation of the EUMR, Treaties, and Union Law but also fins support in established case law[33].

The established jurisprudential trajectory over the years validates the CJEU's interpretation regarding the application and scope of Article 102 of the TFEU to mergers not subjected to prior assessments. Therefore, the position adopted by the CJEU rests on a solid foundation, both in its analysis

33 As is the case with the judgments C-6/72, *Europemballage Corporation and Continental Can Inc v Commission*, ECLI:EU:C:1973:22,§26; C-395/96 P and C-396/96 P, *Compagnie Maritime Belge Transports e o. v Commission*, ECLI:EU:C:2000:132, §113; C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, ECLI:EU:C:2011:83,§26; C-724/17, EU:C:2019:204, *Vantaan kaupunki v Skanska Industrial Solutions Oy e o*, ECLI:EU:C:2019:204, §24.

and in decisions rendered in previous cases, demonstrating the coherence and continuity of the approach taken.

Therefore, the CJEU concluded that the aforementioned Article 21(1) of the EUMR does not prevent an NCA from assessing a merger (i) that lacks an EU dimension; (ii) falls below relevant control thresholds; and (iii) has not been subject to prior control, as constituting an abuse of a dominant position under Article 102 of the TFEU, especially in the context of a national market.

Within the scope of Case C-449/21, and aligning with the CJEU, Advocate-General Kokott (2022), in a non-binding opinion submitted to this Court, expressed that mergers that have not been notified and therefore assessed (either under the EUMR or national merger control rules) may still fall under the scope of Article 102 of the TFEU. AG Kokott (2022) further argues that a parallel can be drawn between the application of Article 102 of the TFEU and Article 22 of the EUMR, suggesting that both share an equivalent level of relevance, especially when dealing with mergers posing competition challenges that, nevertheless, do not reach the required predefined thresholds and, as such, are not subject, in principle, to prior assessment.

The effects of applying Article 102 of the TFEU as a directly applicable *ex post* assessment mechanism, which is not incompatible with the EUMR, become even more crucial when considering acquisitions targeting promising small enterprises, particularly in the technological sector. Although potential arguments surrounding legal uncertainty may be raised against the use of Article 102 of the TFEU, AG Kokott (2022) emphasizes that the application of Article 102 of the TFEU retrospectively is only possible if the merger has not been approved within a merger control regime, precisely due to the principle of legal certainty.

Therefore, mergers whose market structure effects have been declared compatible with the internal market cannot be classified as abusive under Article 102 of the TFEU as a mechanism for controlling mergers. However, this would no longer be the case if the abusive conduct of the company in question extends beyond the scope of merger control.

5.4. Potential implications of the Towercast case law on the future of merger control

Revisiting an older practice and considering the recent developments in merger control, particularly the increased analytical authority granted to NCAs regarding mergers below established thresholds, it can be stated that the decision of the CJEU aligns precisely with this recent context in addressing increasing concerns raised by killer acquisitions[34].

Therefore, although there may be disagreement regarding the application of Article 102 of the TFEU as an *ex post* mechanism for merger control, the stance taken by the CJEU in the Towercast case is, in our view, another step in the evolution of increasingly stringent merger control, notwithstanding that the practical implications are not yet fully known. The use of this mechanism will dictate its practical ramifications.

As an example, in March 2023, following the judgement rendered by the CJEU in the Towercast case, the Belgian National Competition Authority announced the initiation of an investigative process into a potential abuse of dominant position related to a recent acquisition in the broadband communication services market. This acquisition had not been subject to prior notification or approval under Belgian competition law. The Belgian NCA deemed that, following the Towercast case law, the CJEU unequivocally affirmed the competence of national competition authorities to examine non-notifiable mergers under merger control, based on the *ex post* application logic of Article 102 of the TFEU[35].

The use of Article 102 of the TFEU is not, in itself, a novelty, and the potential application of this article has been discussed in academic literature. Despite some doctrinal discussions, most opinions have not been favourable to its application.

In a favourable stance towards the application of Article 102 of the TFEU as a mechanism capable of addressing the challenges of competition in the digital sector Crémer *et. al*[36] asserted that "*we are convinced that the basic framework of competition law, as embedded in Articles 101 and 102 of the TFEU, continues to provide a sound and sufficiently flexible basis for protecting competition in the digital era*".

In terms of positive implications arising from the prospect of the direct application of Article 102 of the TFUE, particularly concerning the oversight of killer acquisitions that hitherto have eluded the mesh of national regulations and legislations governing merger control, Lamo (2019:4-5) argues that the Tetra Pak I case shares various resemblances with killer acquisitions.

34 Dentons, 2023.

35 Thorell & Ek, 2023.

36 European Commission, 2019:3. Regarding the use of Article 102 of the TFEU, the Crémer Report focuses primarily on the issue of access to date.

Lamo further suggests that the rationale of the Tetra Pak I case could be extrapolated to the latter scenarios, upholding that there is no impediment to the application of Article 102 of the TFEU. In line with the proposition outlined in the Furman Report (endorsed by the UK Competition and Markets Authority), Lamo advocates for a combination of an *ex ante* control mechanism, requiring companies with a strategic market status to notify their transactions, alongside an *ex post* application of Article 102 of the TFEU by a dedicated unit for digital markets.

In contrast, one of the unfavourable arguments, highlighted as a potential implication of this case law is that, from the perspective of companies, investigations into transactions that do not reach notification thresholds diminish the predictability of operations, in terms of timelines and considering the risk of operations being scrutinized by competition authorities even after their completion[37].

While AG Kokott has underscored the inapplicability of Article 102 of the TFEU to mergers that have undergone assessment, the question of when or at what point Article 102 of the TFEU ceases to be applicable as a mechanism for *ex post* assessment of mergers becomes intriguing, pertaining particularly to those operations did not undergo and *ex ante* assessment.

It is crucial to underscore, within the scope of the current discussion, that the burden of proof, both concerning the existence of an abuse of dominant position and its opposite, may prove to be excessively burdensome for the involved parties.

For the purpose of Article 102 of the TFEU, and in the context of practices that take time to consolidate and exhibit their characteristics, it may become necessary to establish criteria or guidelines that enable the parties not only to fulfil their respective burdens of proof but also identify the moment at which it becomes apparent whether the mechanism in question is applicable to the merger or not.

Therefore, despite concluding that the mechanism of Article 102 of the TFEU is a judicious step towards addressing competition concerns arising in the context of killer acquisitions, particularly in the realms of digital markets and sectors, when applied *ex post* to mergers that were not subject to an *ex ante* assessment, there still appears to be some uncertainty regarding its actual effectiveness in controlling such mergers and in its practical application. Thus, the concerns raised by some authors regarding the application of

37 Mills & Reeve, 2023.

Article 102 of the TFEU as a mechanism to address mergers that elude the framework of merger control legislation seem reasonable and justified, being necessary to explore additional solutions that address potential shortcomings that may emerge in the application of such mechanism.

6. THE FLEXIBLE APPROACH SOLUTION

Digital markets are highly flexible, which requires an adaptation in the assessment of mergers. Such assessment needs to extend beyond the traditional framework, taking into consideration the complexities of these markets, despite the existing flexibility in the merger control framework.

Assuming that the proposed solution must be better that the existing one, we advocate for an approach that embraces flexibility[38]. This entails a solution that combines existing measures and novel mechanisms to minimize the turnover threshold gap, ensuring that killer acquisitions undergo the scrutiny they should face due to their inherent complexity and potential effects.

As such, when we refer to a flexible approach, we allude to the Commission's ability to adapt its analytical framework and tools to effectively confront the unique challenges posed by killer acquisitions. This entails considering both the specific characteristics of the merger and the involved markets, as well as the dynamic nature of competition in the digital markets. Such an approach ensures the safeguarding and protection of both effective and potential competition, as well as innovation and consumer welfare. It allows for the recognition of the importance of non-price-related competition, such as technological competition, which relates to other factors such as data, innovation, quality, or privacy. This involves assessing how killer acquisitions are likely to impact these dimensions of competition.

The first step, and perhaps the most complex, involves clearly defining what constitutes a killer acquisition. The difficulty also lies in determining whether a single notion of killer acquisition should be identified, adaptable to all sectors where it may occur, each presenting distinct characteristics, or if separate notions should be established for each sector or market where such acquisitions may take place. Given the dynamic nature of this reality, even with one (or several) definitions of killer acquisitions, it will need to be revised regularly to guarantee its effective application.

38 In this sense, Lamo, 2019:17.

In this regard, the control mechanisms to be implemented should be as rigorous as possible, enabling the early identification of mergers exhibiting the characteristics or nature of a killer acquisition. An ongoing assessment and scrutiny of transaction trends at the level of, in this specific case, the digital sector and markets, will undoubtedly be necessary. Specific observatories may be established for this purpose, fostering close collaboration between academics and industry experts.

The introduction of qualitative thresholds, such as the incorporation of criteria like innovation and database ownership, to address the gap of quantitative criteria, is, in our view, imperative. This should be coupled with the strengthening of existing mechanisms, such as Article 22 of the EUMR, essential for achieving the intended objectives. Despite the recent expansion of Article 22 of the EUMR and the acknowledgment of efforts to broaden a mechanism that has proven to be among the most useful in ensuring certain mergers are reviewed by the Commission, it lacks greater determination in its criteria. It is crucial to note that its application will always be confined to the territories of those Member states resorting to this mechanism.

The enhancement of international cooperation is another crucial aspect for the success of any solution, particularly that of the flexible approach. Digital markets are not constrained by physical or geographical barriers, although they may encounter regulatory obstacles. Therefore, reinforcing information sharing, coordinating investigations, and aligning efforts in applying competition law and merger control with global effects would be an asset in addressing potential jurisdictional challenges that may arise.

Ultimately, the presence of *ex post* mechanisms to rectify anticompetitive consequences is emphasized. Expanding upon the legal approach established in the Towercast case, the clarification is sought on the Commission's allowable extent and duration of intervention under Article 102 of the TFEU in mergers that have occurred but exhibit their effects at a later time.

Regardless of the adopted solution, it should always uphold the principle of legal certainty. This entails ensuring transparency and clarity in criteria and processes, preventing unnecessary bureaucracy, and providing certainty to all involved parties regarding the definitive solution or response to be given in a specific case.

7. FINAL REMARKS

The reality of digital markets, with their unique and constantly evolving characteristics, poses a significant challenge to competition law in general, and to the European Commission in particular, regarding merger control.

The insufficiency of the turnover threshold underscores the need for profound changes in the regulatory framework for merger control, as current norms face heightened challenges in comprehending and capturing the dynamics of digital markets. This insufficiency ultimately amplifies the risk of potentially anticompetitive practices, such as killer acquisitions.

In seeking to develop new solutions and mechanisms that enable the effective and efficient control of mergers involving startups, which may potentially give rise to anticompetitive effects, steps are being taken towards safeguarding innovation, fostering fair competition, and enhancing consumer well-being.

In this context, the significance of precedents such as the Towercast case constitutes a crucial milestone that reinforces the notion of the importance of a broader and more flexible approach within the scope of merger control, particularly within the digital sector.

With the evolution of the digital landscape, it is essential for authorities to remain vigilant and flexible, developing strategies that allow them the necessary adaptability to apply the legal framework to innovative situations. This must be achieved without compromising the crucial legal certainty, thereby ensuring the sustainable and competitive development of the digital economy.

Regulatory bodies and policymakers should contemplate the integration of additional criteria in the assessments of mergers in digital markets. These criteria may encompass the evaluation of potential impacts on innovation, market entry barriers, data concentration, intellectual property, and ecosystem effects.

To ensure healthy competition and foster innovation in digital markets, it is crucial to strike a balance between facilitating acquisitions that generates genuine synergies and prohibiting acquisitions with the sole purpose of eliminating potential rivals.

Digital markets operate on a global scale, with companies often surpassing national borders. Assessing the impact of a killer acquisition may require consideration of global competition dynamics and potential effects on international competition. Coordinated efforts among competition authorities worldwide may be necessary to address the challenges posed by cross-border killer acquisitions.

The weighing of quantitative and qualitative factors, the delineation of relevant markets, the understanding of long-term innovation implications, the outset of effective solutions, and the promotion of international cooperation dictate a thorough analysis as addressing these issues will contribute to the development of more robust and adaptable frameworks for merger assessments, better equipped to safeguard competition and consumer welfare in an evolving business landscape.

As such, we are led to conclude on the necessity for reassessment, improvement, and the development of new mechanisms that enable and ensure effective application of competition law and merger control to the digital sector and markets.

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