ASSESSING "KILLER ACQUISITIONS": AN ASSETS AND CAPABILITIES-BASED VIEW OF THE START-UP

BY DAVID PÉREZ DE LAMO[1]

1 Legal Consultant at Cleary Gottlieb Steen & Hamilton (Brussels); LL.M. European Legal Studies, College of Europe (Bruges).

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I. INTRODUCTION

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

II. PRELIMINARY CONCEPTUAL CLARIFICATIONS

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

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

The "star" article that served to propel this debate, "*Killer Acquisitions*," defined the term as acquisitions of promising companies by incumbent firms with the sole purpose "to discontinue the target's innovation projects and pre-empt future competition."[5] Hence, the term was initially defined in a narrow sense, only including those transactions after which the target project would be shut down. In this regard, it should be noted that the article's estimate – that around 6 percent of all acquisitions in the pharmaceutical sector were killer acquisitions – was therefore limited to this specific type

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

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

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

5 C. Cunningham, F. Ederer & S. Ma, "Killer Acquisitions," available at SSRN, March 22, 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3241707.

of acquisition. When the debate spread to the antitrust world, the concept of "killer acquisitions" started to be used in a much broader sense. Subsequent conferences employed the term in a general way to include all acquisitions of promising companies by incumbent firms with the objective of suppressing potential competition, regardless of whether the target company and its innovative project were terminated post-transaction.

In this paper, the broader concept will be used. Therefore, acquisitions that result in the target project not being developed to its full potential, as opposed to plain termination, will also be included under the banner of killer acquisitions. So-called "zombie acquisitions"[6] are also detrimental to innovation because they similarly result in the loss of a potential competitor and its innovative pipeline projects. Further, acquisitions of superior projects to ones held by the acquirer, which therefore result in the discontinuation of its own, will also be included. Despite their apparent innocence, "*suicide acquisitions*"[7] harm innovation by removing a potential competitor and preventing the development of new projects by the acquirer to counter the threat. This paper will use the term "killer acquisitions" in a broad sense to refer to all such potentially anti-innovative transactions, including "zombie," "suicide," and other similarly-motivated acquisitions.

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

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

1. Encouraging and promoting innovative efforts

As the EC Report highlighted, "the chance for start-ups to be acquired by larger companies is an important element of venture capital markets: it is among the main exit routes for investors and it provides an incentive for the private financing of high-risk innovation."[8] "Entry for buyout," as it is described in the economics and management literature, is in many cases the only reason entrepreneurs are willing to undertake certain projects. Even if the latter may result in valuable and innovative products in the long run, they frequently yield from zero to negative returns in the early stages of development. Entrepreneurs are thus only willing to take on these projects and forgo early profits with the expectation of one day being acquired by a large company.

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

2. Integrating complementary products and capabilities

When an acquirer purchases a complementary technology, the merger will generally increase the innovation performance of the resulting undertaking,[9] so long as it is carefully integrated.[10] With that purpose in mind, companies often "bolt-on" the newly acquired complementary technologies and capabilities to their current offerings in order to enhance their value proposition. "*Bolt-on acquisitions*" are pervasive among big tech firms. For instance, Google acquired and integrated complementary technologies and capabilities to its Google Maps product, ranging from traffic and map analysis to location-based analytics and local recommendations/reviews apps – like ZipDash, Where2, Keyhole Inc, Endoxon, ImageAmerica, Quiksee, Zagat, Clever Sense, Skybox Imaging, Urban Engines, etc. – which have allowed it to substantially improve its product. Among these, only *Google/Waze* raised any anti-competitive concerns.[11]

In addition, recent empirical research into M&A activity in the digital sector supports this claim. In "*Mergers in the Digital Economy*," Gautier & Lamesch concluded that, out of the 175 acquisitions by Google, Amazon, Facebook, Apple and Microsoft ("GAFAM") between 2015

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

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

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

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

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

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

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and 2017, only one could potentially be characterized as a killer acquisition.[12] As they showed, even if more than 60 percent of projects acquired by the GAFAM companies are shut down post-transaction, the underlying assets and capabilities (mainly functionality, technology, talent or IP) are subsequently integrated into their ecosystem, acting as a substitute for in-house R&D.

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

A. The Elusive Nature of Killer Acquisitions

The first and most important impediment to the assessment of acquisitions of promising companies by incumbent digital firms is that they often escape the notification requirements of the EU Merger Regulation ("EUMR"). In this sense, the Furman Report noted that GAFAM have engaged in close to 250 acquisitions globally in the last five years, without any of them being prohibited.[13] Others have reported similar numbers.[14] This is explained by the fact that, to determine whether a transaction is notifiable, thresholds usually take into consideration not only the combined aggregate turnover of the merging parties, but also their individual aggregate turnover.[15] In contrast, "start-ups attempt [first] to build a successful product and attract a large user-base without much regard for short term profits: they hope either to be acquired or to begin monetizing their user base at a relatively late stage."[16]

As a result, little is known about the acquisitions of digital incumbents. It would thus be desirable for the competition authorities to conduct empirical studies, making use of their sector enquiry and request for information tools. In this respect, the U.S. Federal Trade Commission's ("FTC") recent initiative to investigate past acquisitions of the leading digital firms is welcomed.[17] The results of this investigation will be key for determining the extent and scope of the killer acquisition concern, if any, and will undoubtedly help us to understand better how digital incumbents create and expand their market power.

B. Ex Ante Control Mechanisms

Until now, some of the transactions that escaped the EUMR thresholds were caught through the referral mechanism of the EUMR.[18] This was, for instance, the case of the *Apple/Shazam* merger, which was referred to the Commission by the Austrian authority, together with other national competition authorities, in accordance with Article 22(1) EUMR. This mechanism is limited in effect as the Commission is only able to look at the implications of the merger in the territories of the referring Member State authorities. Other acquisitions, like *Facebook/WhatsApp*, were referred to the Commission by the notifying parties, in accordance with Article 4(5) EUMR. In the latter case, the Commission acquires full jurisdiction over the transaction but, transactions need to be notified to the Commission by the concerned parties, and this may not be in their own interest. Because of these factors, the referral system has proven to be insufficient and some controversial transactions never reached the Commission's hands, including *Facebook/Instagram* and *Google/Waze*. Both transactions were instead caught by the UK merger framework and assessed by the Office of Fair Trading.[19]

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12 A. Gautier & J. Lamesch, "Mergers in the Digital Economy," at SSRN, January 17, 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3529012.

13 Furman Report, p. 91.

14 "Did Big Tech Get Too Big?," Bloomberg, March 21, 2019: 431 acquisitions in the last decade; A. Gautier & J. Lamesch, *supra* note 12: 175 acquisitions between 2015 and 2017.

15 EUMR, Articles 1(2) and (3).

16 EC Report, p. 116.

17 FTC to Examine Past Acquisitions by Large Technology Companies, February 11, 2020. The FTC sent orders to GAFAM requiring them to provide information and documents on the terms, scope, structure and purpose of all their non-reported acquisitions between January 1, 2010 and December 31, 2019.

18 The referral mechanism of the EUMR consists, in essence, of a system which allows for transactions that would normally have to be assessed by the Commission to be transferred to the National Competition Authorities ("NCAs") and *vice versa*. The relevant provisions of the EUMR are Arts. 4(5) and 22, for referrals from the NCAs to the Commission, and Arts. 4(4) and 9, for referrals from the Commission to the NCAs.

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

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In order to fill the gap, and following Austria and Germany's lead, many called for a reform of the EUMR to adopt transaction value-based thresholds.[20] Nevertheless, this proposal shows several potential weaknesses, as highlighted by the EC Report. The first one is that transaction values of companies are complicated and there are different methodologies for measuring them. In addition, transaction values may quickly change in response to events that are unrelated to the underlying assets. All of this could create legal uncertainty as to when companies should notify. Second, the extension of the jurisdiction could entail a significant increase in administrative burden for the Commission, as well as additional transaction costs for merging parties. Third, the exercise of designing and calibrating the thresholds would be quite intricate in itself, as "there is a fine line between introducing a transaction value threshold which is too low and captures too many transactions and one which is too high and does not capture enough."[21] In this connection, transactions could be unbundled and implemented in a manner designed to avoid the thresholds. For all these reasons, the Special Advisers suggested taking stock from the Austrian and German reforms before drawing conclusions at EU level.

However, two years have already passed since Germany and Austria opted for the transaction value-based thresholds and there still seems to be no consensus on the suitability of this model. On the one hand, it seems that (i) the thresholds have not led to a significant increase in administrative burden, as only a few dozen cases have been further notified; and that (ii) they were well-tuned to capture transactions in the most problematic sectors, namely in the IT, pharmaceutical and chemical industries.[22] On the other hand, the rest of the problems still stand and may even explain the small number of transactions that have been captured. That is why the possibility of lowering the thresholds has been discussed.[23]

For its part, the Furman Report made the recommendation to "[require] digital companies that hold a "*strategic market status*" to make the CMA aware of their intended acquisitions [to] allow the CMA to determine in a timely manner which cases warrant more detailed scrutiny."[24] According to the report, companies holding market power over a strategic bottleneck market would be deemed to have "strategic market status."[25] This approach is arguably deficient, in that not all the firms whose transactions may raise concerns operate as "gatekeepers" to a market. This may be true, for instance, for Google or Amazon, but it is certainly not true for Apple, Microsoft, or Facebook, among others. Further, Google may be a gatekeeper in general search, but it is definitely not in other relevant markets.[26] For these reasons, a broader definition of "*strategic market status*" based on a more comprehensive approach, similar to the assessment of (super-)dominance, would constitute a superior alternative. Other factors should be taken into consideration, such as particularly high market shares and substantial barriers to entry in the form of network effects, intellectual property rights, or the availability of large data sets and user bases.

This mechanism could be designed in different ways to avoid each and every transaction being notifiable in the traditional sense, minimizing the administrative burden for authorities and transaction costs for firms. A list of companies with designated market status could be drawn up - according to pre-defined criteria. These companies would only have to communicate basic information to the authorities about their planned transactions. This fast-track "communication" procedure would be speedier than the existing Commission simplified procedure, and would focus on providing the necessary information to make a preliminary substantive assessment. This could be limited to information about (i) the assets and capabilities of the target; (ii) the rationale of the transaction; and (iii) its pro-innovative effects. If, in the light of this information, the authorities do not raise any concerns within a short period of time, the transactions could be approved by administrative silence. Alternatively, the communication procedure could be used without a standstill obligation, in combination with an *ex post* merger control regime. In fact, Norway has adopted a similar system and it has reported very positive results, leading France to seriously consider this model.[27] The latter option will be further analyzed in the next section.

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20 M. Sauermann, "New merger control guidelines for transaction value thresholds in Austria and Germany," *Competition Policy International*, July 26, 2018.

21 EC Report, p. 114.

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

23 For instance, see Concurrence's Innovation Economics For Antitrust Lawyers (London – March 1, 2019).

24 Furman Report, p. 12.

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

26 Why should we scrutinize then its acquisitions in other relevant markets where it does not have that gatekeeping position?

27 See I. de Silva's contribution at the 10th Annual NYC Concurrences Private Dinner. Startups v. Big Tech: Where Is the Innovation? (New York – September 12, 2019).

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Finally, another concern should be briefly considered. As already mentioned, many of the acquisitions by digital incumbents do not even target companies as such, but focus on acquiring key assets and capabilities. This is the case of so-called *"acqui-hires"* of talented engineers and entrepreneurs. However, there is no reason why these acquisitions could not be captured with an extension of the notion of "undertaking," especially as the acquired assets and capabilities will determine the economic fate of the start-ups they belong to.

C. Ex Post Control Mechanisms

Another option that has been widely discussed is the possibility of introducing a system of *ex post* merger control, following the example of the United States. Since the latter system is the most well-known, it will be used as an example, but there are many other countries that have adopted *ex post* merger control systems, albeit with different nuances, like the UK, Australia, Sweden, Austria, Hungary or Lithuania.[28] This system has also been proposed for reform in France very recently.[29]

In the U.S., the thresholds are not jurisdictional, allowing the FTC to review and prohibit transactions that have already been consummated. This system could be interesting for several reasons. First, it would enable the competition authorities to better assess the real potential of the target companies and their innovative projects, as they are often acquired at an early stage of development. The competitive effects of the transaction could be better evaluated once the transaction's implementation has begun. Second, an *ex post* prohibition decision would pose fewer practical problems in this area, as the contours of the transaction are usually well-defined. Given that the typical target of these acquisitions are small start-up companies with a few key assets and capabilities, these could be readily detected and extracted from the merged entity to reverse the transaction. However, there would still be cases where undoing the transaction would prove impractical, for instance, in know-how-based acquisitions, or where the targets are data sets or user bases that are mixed up post-transaction, as happened in *Facebook/WhatsApp*.[30]

On the other hand, this system would create significant legal uncertainty if, like in the U.S., no time limits were put in place for the opening of an investigation. For the *ex post* system to be properly calibrated, it would thus be necessary to set a relatively short time limit after which transactions could no longer be reviewed. A time limit of between six months and one year, similar to that set out in the French reform proposal, seems to be a reasonable period that would mitigate the legal uncertainty.

Finally, another alternative would be the application of Article 102 TFEU to acquisitions by incumbent digital firms, as the Commission did in *Tetra Pak I*. In that case, the Court of First Instance upheld the Commission's finding that "the acquisition by an undertaking in a dominant position of an exclusive patent license for a new industrial process constitutes an abuse of a dominant position where it has the effect of strengthening the undertaking's already very considerable dominance of a market where very little competition is found and of preventing, or at least considerably delaying, the entry of a new competitor into that market, since it has the practical effect of precluding all competition in the relevant market."[31]

This case shares many traits with the killer acquisition scenario and there is no reason in principle why its rationale could not be extended. The application of Article 102 TFEU would provide the Commission with a more complete enforcement toolbox, as it would (i) serve as a general deterrent, (ii) require a lighter burden of proof than merger control, and (iii) allow the Commission to sanction strategies aimed at systematically neutralizing nascent competitors by establishing a single and continuous infringement. It seems that this possibility has been explored, across the Atlantic, by the FTC under Section 2 of the Sherman Act.[32]

D. A Flexible Approach

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

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

29 For an interesting debate on the reform, see Concurrence's dedicated issue, "Faut-il généraliser les évaluations *ex post*?," *Concurrences*, Nº 1-2020, pp. 22-38.

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

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

32 See E. Kraus' contribution at the 7th Global Merger Control Conference (Paris – December 6, 2019).

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IV. SUBSTANTIVE ASSESSMENT

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

A. Horizontal Mergers: Transactions with Overlap

In these cases, the assessment will be relatively simple since the acquisition would not pass the substantive test of the EUMR, as it would lead to a significant impediment of effective competition ("SIEC"): acquiring a promising start-up would strengthen the incumbent's dominant position by removing and integrating a potential challenger.[33] Again, this would be in line with *Tetra Pak I*, where Tetra Pak's acquisition of the only relevant competing technology was deemed an abuse of dominance, as it had the effect of strengthening the undertaking's already very considerable position in a market where very little competition could be found.

Without prejudice to possible hindsight bias, this should have been the case in *Facebook/Instagram*, where the OFT summarily dismissed the potential competition issue in relation to the supply of social network services.[34] The differences in functionalities highlighted by the OFT were rather negligible and a broader relevant market definition from the users' side would have made more sense. In any case and leaving the specifics of that case aside, the way in which we determine relevant markets, as well as potential competition, should likely be updated, as the current Market Definition Notice[35] dates from 1997. Therefore, the Commission's recent initiative to reconsider it is welcomed.[36]

B. Non-Horizontal Mergers: Transactions without Overlap

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

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

Due to the difficulty of this exercise, the possibility of reversing the burden of proof has been raised, most famously by Tommaso Valletti, the previous Chief Economist of DG Competition,[37] but also by the Stigler and ACCC Reports.[38] According to this proposal, acquisitions of promising start-ups by digital incumbents should be presumed anticompetitive unless the parties can prove that the transaction would bring significant efficiencies. The authorities would no longer have the obligation to prove the potential anti-competitive effects of the merger as a result. Instead, it would be up to the parties to demonstrate its pro-competitive effects and the lack thereof would result in the transaction being prohibited.

In addition to reversing the burden of proof, various proposals have been made to reduce it. In this sense, the Furman Report laid down a much-discussed proposal according to which the CMA should be bolder and "more economically oriented" by changing the evidentiary standard from a "*balance of probabilities*"[39] to a "*balance of harms*." In essence, the idea would be to relax the evidentiary standard in mergers with a "potentially very large scale of lost benefits." That would mean that, when the magnitude of the harm is considerable, the evidentiary standard

33 Provided that there are no other relevant countervailing efficiencies.

34 *Facebook/Instagram* (Case ME/5525/12), OFT Decision of August 22, 2012, pars. 15-25.

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

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

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

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

39 The Commission has a very similar legal standard: "significant likelihood" (Horizontal Merger Guidelines, par. 60).

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would be lowered from a "more likely than not" to a "realistic prospects" standard. [40] According to the Furman Report, this should be amended despite some "occasional rare false positive along the way."

While these modifications may seem tempting at first, the reality is that they have been widely rejected by the antitrust community, as they present several critical flaws.[41] First, it is hard to define on paper for exactly which transactions the burden of proof would be reversed/reduced, and it is clear that this should not be left to the discretion of the authorities on a case-by-case basis. Second, such an evidentiary asymmetry[42] would leave the competition authorities with an incommensurate level of unbacked (and thus, incontestable) discretion which could result in arbitrary decision-making. As the famous astronomer Carl Sagan once put it, "extraordinary claims require extraordinary evidence" or, equally, "what can be asserted without evidence can be dismissed without evidence."[43] Third, there are no economic or empirical reasons to justify such a change since most acquisitions by digital incumbents foster innovation, either directly or indirectly.[44]

To presume that all such transactions are anticompetitive without any justification whatsoever would be harmful to the competitive process and violate the presumption of innocence. In any event, it is doubtful whether these changes would work in practice. With respect to the reversal of the burden of proof, parties will generally be able to come up with some sort of efficiency rationale, bringing the authority back to square one.[45] As for the balance of harms proposal, the authority would need to (i) identify a range of possible future outcomes, (ii) estimate their probability, and (iii) assess their impact on customer welfare, which is likely to raise insurmountable practical hurdles.[46]

2. Novel Theories of Harm: Platform Envelopment

For its part, the EC Report proposed a novel theory of harm based on a "broader view of the position of the incumbent in a *market for the digital ecosystem*,"[47] where the harm would derive from the strengthening and enclosing of a particular "user space" by expanding network effects from one platform to another. Similarly, Gautier & Lamesch suggested that the main damage to competition and innovation may derive from conglomerate effects, as digital incumbents consolidate and expand their market power by acquiring to reinforce and leverage their core segments.[48]

The novel theory of harm proposed by the EC Report also displays significant shortcomings. Primarily, it is difficult to grasp what the actual harm is in this theory: are users, as a consequence of the acquisition, paying a higher price, enjoying lower quality or less choice? If anything, it seems that users decide to stay on the newly created platform because they derive significant added value from the strengthened network effects, as well as from the substantial economies of scope, consumption synergies and complementarities created.[49] That is why conglomerate mergers are generally procompetitive.[50] It is true that conglomerate mergers can lead to foreclosure, but that potential concern can already be tackled with current tools, as demonstrated by the Non-Horizontal Merger Guidelines[51] and abuse of dominance case law on bundling and tying practices. By accepting this theory of harm, in reality, we would be transforming the mere potential for foreclosure into the actual harm itself, unduly anticipating the analysis. For these reasons, the proposal of the EC Report seems both unsatisfactory and unnecessary.

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40 That the negative effects are merely "likely to occur."

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

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

43 Known as "Hitchens's razor."

44 See *supra*, Section II.

45 How much more efficient should the transaction be when the anti-competitive effects were never established? Indeed, any efficiencies would suffice. Further, non-horizontal mergers are generally considered to be more efficient than not, given the complementarities of the parties (EC Non-Horizontal Merger Guidelines, para. 11 et seq.).

46 T. Lécuyet, *supra* note 41, pp. 45-46.

47 EC Report, p. 122.

48 A. Gautier & J. Lamesch, *supra* note 12.

49 T. Lecuyet, *supra* note 41, pp. 46-50.

50 EC Non-Horizontal Merger Guidelines, para. 11 et seq.

51 *Ibid*. para. 93 et seq.

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3. The Innovation Competition Approach

An innovation competition approach would provide the necessary tools to tackle the intricate problem at stake. In a series of cases ranging from *Novartis/GlaxoSmithKline*[52] and *GE/Alstom*[53] to *Dow/DuPont*[54] and *Bayer/Monsanto*,[55] the regulated framework of the pharmaceutical, industrial manufacturing and agro-chemical sectors allowed the Commission to capture restrictions of competition at an early stage, that is, before any anticompetitive effect on the relevant market could be predicted with enough certainty. This means that, if we managed to extrapolate the innovation competition methodology to digital transactions, it would not be necessary to establish a "potential competition" relationship to the (highly demanding) requisite legal standard.

Instead, we would need to show that the target company is both pursuing a discernible innovation objective (namely creating a potentially competing product from an adjacent market), and that it has the ability to carry it through. In this respect, it would not matter if it is still uncertain whether the product under development will in fact end up competing with the existing product or whether it will eventually reach the market at all: as it was established in those cases, the object of protection would be the incentive of the parties to innovate, that is, *the innovative process per se.*[56]

The EC Report explicitly rejected the application of the innovation spaces methodology to digital transactions on the ground that in the digital sector, as opposed to the heavily regulated pharmaceutical and agro-chemical industries, R&D does not take the form of a distinct and well-structured process with clearly identifiable research poles.[57] In contrast with this statement, the Commission has managed to shift outside of the pipelines framework in the last agro-chemical cases *Dow/DuPont* and *Bayer/Monsanto* to define innovation spaces at the level of *early R&D efforts*. As shown in these cases, a holistic approach, including an analysis of (i) *essential resources* (e.g. intellectual property rights, data sets, large user bases, specialized and expensive hardware, access to financing, engineering skills, and computation power);[58] (ii) *capabilities* (as a function of the company's skillset, strategy, governance structure, and past behavior);[59] (iii) *patent overlaps*; (iv) *investment plans of both merging parties* setting innovation targets; and (v) *internal documents of the acquirer* with post-merger divestment plans, should allow the Commission to define the relevant *innovation space* and perform an innovation competition assessment in digital transactions, despite the absence of pipelines.[60] In this regard, instead of a classic innovation competition setup of overlapping pipeline products or early R&D efforts (as in *Dow/DuPont*), the situation would present an existing product that is being threatened by an incoming innovative product in the pipeline (as was the case in *Medtronic/Covidien*[61]).

In fact, the EC Report later accepted that this approach may "obviously" be relevant in some circumstances where essential resources or capabilities are present, but did so to underline that because of their absence at an early stage, the methodology would rarely be applicable to the acquisition of incipient start-ups.[62] This point seems unconvincing because, in order to raise any competition concerns, early and targeted

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

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

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

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

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

57 EC Report, p. 120.

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

59 J. G. Sidak & D. J. Teece, "Dynamic Competition in Antitrust Law," (2009) 5(4), *Oxford Journal of Competition Law and Economics*, pp. 614-617.

60 Similar suggestions have been made by M. Bourreau & A. De Streel, "Digital Conglomerates and EU Competition Policy," (2019), p. 27-28; W. Kerber, *supra* note 58, pp. 15-16. This approach has been recently endorsed by OECD experts at the Competition Open Day 2020 (Paris - February 26, 2020), see P. Gonzaga's contribution in the third panel dedicated to "Merger Control in Dynamic Markets."

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

62 EC Report, p. 120.

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acquisitions must be triggered for a specific reason. There must be something particularly valuable about the target company, in terms of assets or capabilities, for the incumbent to find it promising and to acquire it (usually for a significant sum) instead of just replicating the technology or product in question. If no key assets or capabilities are detected, on the contrary, the transaction should logically not raise any competition concerns at all, as the relevant innovation space would consequently be much wider. In that case, the acquisition by the incumbent firm would be merely speculative (or just neutral to competition) and any competition concern raised by the authorities would equally be unsubstantiated. This should not, however, constitute an argument for the non-application of the innovation competition approach.

V. CONCLUSION

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

Based on the available evidence, it appears that the majority of acquisitions by digital incumbents do not have the objective of eliminating competition but, on the contrary, foster innovation by encouraging or promoting innovative efforts and integrating complementary products and capabilities.

Further, *ex ante* and *ex post* control mechanisms to capture and deter acquisitions by digital incumbents have been discussed. However, these systems are not mutually exclusive. In fact, it may be effective and sensible to combine those systems.

Finally, this paper recommends that the Commission adopt the innovation competition approach, as developed in *Novartis/GlaxoSmith-Kline*, *GE/Alstom*, *Dow/DuPont*, and *Bayer/Monsanto*, in the substantive assessment of alleged "killer acquisitions" in the digital sector.

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