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CONCENTRATIONS IN DIGITAL SECTOR - A NEW EU ANTITRUST STANDARD FOR "KILLER ACQUISITIONS" NEEDED?

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ABSTRACT

Digital technologies are one of the most important factors driving the current EU to revise its competition rules, inter alia in an area as sensitive to corporate strategies as mergers and acquisitions. The European Commission and a number of independent experts have already identified several key problems that the online environment raises for the application of traditional merger control institutes. Among them the takeovers of promising start-ups, that have already attracted millions of users to their freely distributed application, by some of the major online world players. They are sometimes referred to as "killer acquisitions" and they could even not to come under the authority of the European Commission because the EU Merger Regulation turnover criteria are not achieved. Should other criteria be chosen, or would such take-overs rather be controlled ex-post and under the risk of a de-concentration being ordered? The Commission is coming up with the first outlines of an answer. Its search for a response to these merger control challenges should be closely monitored by corporate practice, as it will set future boundaries for corporate strategies in the markets of tomorrow. The paper tries to structure the main challenges and possible EU law answers to the issue to predict what undertakings must be ready for when contemplating their future strategies for European markets.

KEYWORDS: *EU control of concentrations, jurisdictional criteria, turnover thresholds, killer acquisitions, referrals of cases*

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1. INTRODUCTION

The European Commission is currently conducting an „Evaluation of procedural and jurisdictional aspects of EU merger control".[1] This operation started already in 2016 (!) and since then has periodically attracted attention among businesses, their legal experts, and at moments also of general media and politicians, especially when a high profile merger was stopped by the Commission.[2] After lengthy consultations, the Commission has promised to lead this process to its provisional end and to publish its findings and proposals in a Staff Working Document scheduled for the middle of 2021.

Potential changes in the current EU Merger Regulation (EUMR)[3] have been evaluated from different angles, however, one of the aspects became recently more prominent than others. It is "the assessment of acquisitions of nascent, innovative companies by strong incumbents,… sometimes called *killer acquisitions*, implying that the incumbents are acquiring the targets solely to discontinue and thus effectively *kill* their innovation projects to pre-empt future competition".[4] European start-ups, especially among internet innovators, are seen as potential victims of such kind of acquisitions, be it for the sole reason that on the TOP 20 list of global internet giants are currently only their US, Chinese and Japanese competitors.[5]

This relatively well-known problem was recently lifted into the spotlight by the announcement of the Commission's Executive Vice-President and Commissioner for competition, Margrethe Vestager, made in her September 11, 2020 speech at the Annual Competition Conference of the International Bar

[1] European Commission, Competition, Public consultations, [https://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html], accessed on 12/10/2020.

[2] Most notably after the Commission prohibited Alstom acquisition by Siemens in February 2019 the French and German ministers proposed to subjugate the Commission´s merger scrutiny to a political supervision of the Council of EU ministers. See in Picquier, M. A., Christol, R. France: Refusal of The Alstom/Siemens Merger - The French And German Governments Publish A "Manifesto" For the Modification of Merger Control. Mondaq.com March 27, 2019, [https://www.mondaq.com/france/antitrust-eu-competition-/792306/refusal-of-the-alstom-siemens-merger-the-french-and-german-governments-publish-a-manifesto-for-the-modification-of-merger-control], accessed on 12/10/2020.

[3] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings. OJ L 24, 29.1.2004, p. 1–22.

[4] OECD Directorate for Financial and Enterprise Affairs, Competition Committee: Start-ups, killer acquisitions and merger control – Note by the European Union DAF/COMP/WD(2020)24, 11 June 2020, p. 2

[5] See List of Largest Internet Companies in the World (Ranked by Revenue), July 28, 2020, [https://www.markinblog.com/largest-internet-companies/], accessed on 12/10/2020.

Association.[6] She announced that the Commission intended to change its approach to so-called referrals of merger cases from the Member States to Commission under Article 22 of EUMR so that the potential killer acquisitions, which would normally escape usual merger scrutiny, fall under the Commission´s review. Five short paragraphs of her speech raised a wave of reactions warning that the proposed solution may become a nightmare for companies.

The following text is dedicated to the issue and treats it in two stages. First, it gives a broader picture of the killer acquisition problem and its possible solutions and, second, it discusses what would mean a new reading and usage of Article 22 of EUMR referrals´ regime for companies planning mergers or acquisitions within the EU or the EEA (European Economic Area). It aims to answer the questions of whether the easiest change of the status quo to achieve is really a good solution to the problem and what future developments businesses can expect.

2. EUMR RULES, "KILLER ACQUISITIONS" AND POTENTIAL SOLUTIONS TO THEM

Competition law understands killer acquisition as "a particular variation on the more general 'loss of potential competition through the acquisition of a nascent firm' theory of harm."[7] Such an acquisition triggers the loss of not only a competitive constraint, but also of a product, a technology, or an idea that could have had increased welfare. Therefore, it poses a danger to the efficiency of markets, especially in high-tech, innovative sectors. However, not every acquisition of a recently created company has such consequences, and competition theory must specify the conditions under which a real killer acquisition takes place. Before any such theory can be put into practice the competition authorities must get a legal instrument and framework for its application. In essence, these should be merger control rules. However, the current EU rules contain jurisdictional criteria that do not give the Commission much opportunity to intervene against potential killer acquisitions.

The EUMR regime, i.e. the Commission´s power to review a merger, is normally applicable to concentrations „with a Community dimension".[8] The goal

[6] Vestager, M. The future of EU merger control. Speech at International Bar Association 24th Annual Competition Conference, [https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en], accessed on 12/10/2020.

[7] OECD Directorate for Financial and Enterprise Affairs, Competition Committee: Start-ups, Killer Acquisitions and Merger Control – Background Note by the Secretariat DAF/COMP(2020)5, 10-12 June 2020, p. 2.

[8] See art 1 of EUMR, op. cit. note 3.

is to limit the preliminary compulsory review of concentrations only to those which „may significantly impede effective competition in the common market or in a substantial part of it."[9] Whether a concentration has such a potential depends on the turnover worldwide and also in the EU or in each of at least three Member States… of *all undertakings concerned* or at least of *each of at least two of the undertakings* involved in the concentrations. The lowest (alternative) threshold is currently set in a way that the aggregate EU-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million, and in each of at least three Member States, the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million. Killer acquisitions, however, usually target promising technological start-ups, which for the time being have a minimal turnover, but are attractive for a technological solution that they have already managed to make desired, but not yet profitable.

The EUMR is anchored in a pre-digital world when the focus on turnover criteria was justified. It confers on the Commission the power to control only mergers that are structurally significant for the EU's internal market because they involve two or more firms with a significant market position there. Thus, under Article 1 of the EUMR, a non-EU giant online platform taking over an IT "dwarf" is not obliged to notify the Commission of its intention, as the EUMR is not applicable to this type of acquisition. It means that there will be no authoritative assessment of the effects of that type of transaction on intra-EEA competition, as there is currently no legal instrument that the Commission itself would be empowered to use. The only existing option is to transfer the assessment of a locally important merger, usually falling within the competence of a particular Member State, to the European level, which the EUMR allows under the conditions set out in Article 4 (5) and Article 22 (and will be discussed further on).

There are other, more direct ways of remedying the situation that can be considered. It is possible *to change the turnover criteria set by the EUMR*. Article 1(4) and (5) of the EUMR provides for a mechanism for their updating. These paragraphs confer to the Council the power to change the size of the turnover thresholds by a qualified majority vote, acting on a proposal from the Commission. The wording of these paragraphs however suggests that such changes of turnover thresholds („on the basis of statistical data that may be regularly provided by the Member States") should rather reflect the inflation rate or the graduate expansion of companies´ turnovers. It is more than doubtful, that this update could be used to expand the scope of the EUMR application, i.e. of the

[9] See EUMR op. cit. note 3, preamble, para 5.

Commission´s power to control entirely new categories of concentrations. All substantive changes of the EUMR require the unanimity vote in the Council as this legislation takes the Art 352 TFEU as its legal basis. In any case, such an option remains entirely theoretical, as pushing down the turnover thresholds could destroy the system as not just 400 or so concentrations per year[10], but dozens of thousands of them would have to be notified to the Commission… Logically, therefore, the question arises of what other criteria would be offered to determine the Commission's competence to examine a concentration potentially relevant to the European position in the online market.

It would certainly be possible not to demand a certain turnover from all or at least two participants in the transaction, but *only from one of them, usually from the acquiring one*. It is a concept not unknown in the world, its examples can be found in Albania, or in Latin America, Brazil, or Colombia for instance.[11] At first glance, the solution seems to be very suitable, given that it would make it possible to capture exactly the takeovers when a foreign company, with a turnover sometimes higher than the GDP of a number of EU member states, buys a promising European star-up.[12] However, maintaining the EU-local nexus would require that the acquiring company (if not the acquired one) has a certain turnover in the EU, which excludes from the notification obligation, for example, a Chinese corporate giant entering EU markets through its first acquisition. Therefore, the criterion of a certain significance of the acquired company for the EU would always have to be added. This means supplementing the turnover criterion with other criteria, or, more straightforwardly, by identifying the sensitive sectors in which any acquisition of a "small enterprise by a large enterprise" must always be notified.

[10] In the years 2014–2019, the number of assessed mergers reached 2,000, although only about 1/50 of them advanced to the second in-depth assessment phase. See in Vollarejo, C. M.: *The legacy of Commissioner Vestager and a peek into the future*. Speech at Am. Cham. EU´s competition policy conference. Brussels, October 12, 2019.

[11] Merger Control Thresholds by Practical Law. Thomson Reuters 2020, [https74://uk.practicallaw.thomsonreuters.com/2-557-0145?transitionType=Default&contextData=(sc.Default)&-firstPage=true#co_pageContainer], accessed on 12/10/2020. Pardo, G. I.; Osorio, S. Colombia: Merger Control Laws and Regulations 2020, [https://iclg.com/practice-areas/merger-control-laws-and-regulations/colombia], accessed on 12/10/2020.

[12] Amazon´s annual revenue for 2019 was USD 280.522 billion, Google´s annual revenue for the same year was USD 160 billion, while the GDP of Czechia was USD 246.49 billion, of Portugal USD 236 billion, of Hungary USD 170 billion, of Slovakia US 105.42 billion and examples of all smaller Central and South-eastern European economies may follow. [https://www.statista.com/statistics/266206/googles-annual-global-revenue/] ; [https://www.statista.com/topics/846/amazon/] ; [https://tradingeconomics.com/], all accessed on 12/10/2020.

This would *add a sector-specific criterion of merger review* and a question then could arise whether not to copy the Norwegian solution where specified firms must notify all mergers.[13] Without such sectoral limitation, there could be a sharp increase in notifications, as many new takeovers by companies with high turnover would have to be notified to the Commission. This new power of review should thus better be applied only in high-tech fields such as ICT or pharmacy, where the danger of killer acquisition is most often mentioned. An alternative solution, consisting, for example, in setting the turnover criterion so high that it captures only acquisitions made by companies from the global TOP 100, would probably not be able to identify all potential killer acquisitions. In any case, such a change would have to be approved unanimously by the Council, making the intention difficult to implement politically.

An alternative jurisdictional criterion would be *the value of the transaction*. A buyer willing to pay a high purchase price for a company generating a negligible turnover indicates the importance it attaches to the acquired idea or technology. Such a criterion has already been introduced into national legislation of Germany or Austria and is being applied there in practice.[14] Here too, however, it must be acknowledged that quantifying the 'true value' of a transaction may not be without difficulty, as M. Vestager also stressed: „…it's not easy to set a threshold like that at the right level."[15] For instance, the determination of the valuation moment may cause significant difficulties too due to the volatility of exchange rates or stock prices. The inclusion of a relatively low transaction value in the regulation would surely provide a more reliable capture of all mergers that threaten the chances of European technology start-ups to grow to transnational proportions. This value-based criterion, however, will never be able to decide on its own, as a qualified local nexus to the EU would be missing. Without it, there would be a need to notify the Commission of any major corporate purchase anywhere in the world. It would lead to a significant increase in the number of notified concentrations. This would place a new burden not only on the Commission but also on the merging companies.[16]

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[13] See in OECD Directorate for Financial and Enterprise Affairs, op. cit. note 7, p. 41.

[14] For instance, in Germany the transaction value threshold is laid down as follows: i) Combined worldwide turnover over EUR 500 million, ii) One undertaking concerned had a turnover exceeding EUR 25 million within Germany, iii) Transaction value amounts to more than EUR 400 million, iv) The target has significant activities in Germany (local nexus). See in Muhlbach, T.; Boss, A.: Germany: Merger Control Laws and Regulations 2020 [https://iclg.com/practice-areas/merger-control-laws-and-regulations/germany], accessed on 12/10/2020.

[15] Vestager, M. op. cit. note 6.

[16] The German experience from 2017 on has so far shown that the number of notified transactions has not radically changed. The local nexus consisting in significant activities of the

Therefore, the expert report *Competition Policy for the digital era*, issued by the Commission in 2019, recommends not to change the turnover criterion of the EUMR and rather to better evaluate how many serious acquisition cases really escape the Commission, as well as to watch the experience of Germany and other countries with the new jurisdictional criterion.[17] This change to the EUMR would require difficult unanimous approval by the EU Council. Therefore, M. Vestager pushed this most frequently mentioned option aside in her September 2020 speech: „So right now, changing the merger regulation, to add a new threshold like this, doesn't seem like the most proportionate solution."[18]

Some EU Member States (e.g. Spain), as well as non-EU countries (UK, Canada, New Zealand, United Arab Emirates, Singapore), include among the jurisdictional criteria the *combined market share of the merging companies, or their share of sales of goods or services of a particular description*.[19] In this way, it is really possible to control the situation where a company with a significant market position buys a much smaller company. For the definition of such a criterion, it would be decisive how the market concerned would be defined, whether as an EU / EEA territory without further specification or as a so-called relevant market, which is limited to existing and potential competition with a certain product in a certain territory. The first option may provide legal certainty but capture too many acquisitions albeit not those where a large foreign-based company firstly enters the EU market through the acquisition of a local start-up. The second option would cause even bigger problems. Given the Commission's tendency to define relevant markets in the ICT sector as relatively narrow ones, a killer acquisition targeting an emerging technology market where the buyer is not yet present would not need to be notified at all on the basis of this criterion. Besides, there are pitfalls to correctly defining the relevant market and its market shares. A safer solution would thus be a criterion linked only to a certain type of goods or services and the share of their sale in the EU / EEA (i.e. once more a sector-specific regime of control). Either way, even here, changing the EUMR would require a unanimous vote in the Council.

Another possible solution is also difficult to implement: *the introduction of ex-post controls* of those mergers where there is a marked disparity between the turnover and the purchase price of the business being acquired. This possi-

acquired company in the German territory is required. See in OECD Directorate for Financial and Enterprise Affairs, op. cit. note 7, p. 40.

17 Crémer, J.; de Montjoye, Y.-A.; Schweitzer, H.: *Competition Policy for the digital era - Final report*. Luxembourg: Publications Office of the European Union, 2019, p. 10, 113-115.

18 Vestager, M. op. cit. note 6.

19 Merger Control Thresholds by Practical Law. Thomson Reuters 2020. Op. cit. note 11.

bility is actively promoted, for example, by the French Competition Authority, pointing to the experience of several countries, including the United Kingdom (also Hungary, Ireland, Sweden, Lithuania, USA, Japan…) in *ex post* control of mergers, which have not been notified to the Authority.[20] An indisputable advantage would be the elimination of heuristic difficulties on the part of the competition authorities, which, instead of modeling future impacts, could for some time purposefully monitor the behavior of the merged company and the market reaction to it. Uncertainty would, of course, increase on the part of the merging companies. However, the question (as the French authors point out[21]) is how different it would be from the uncertainty which undertakings already have as to the infringement of the prohibition of cartels under Article 101 TFEU, or abuse of a dominant position under Article 102 TFEU, which are also assessed ex-post.[22]

The ex-post control could be limited to large system players in order not to increase the administrative burden in general (i.e. again a variation on the aforementioned Norwegian solution), and the revocation of their concentration would be possible only within a specified time limit.[23] However, the proposal raises ambiguities regarding the definition of ex-post control conditions, for example, the crucial question is whether to limit it to only cases where ex-ante control has not been carried out, i.e. whether it is to be understood as a safeguard against control evasion due to non-exceeding of turnover criteria. In any case, this also would be a change requiring an unanimously voted revision of the EUMR, so it is far more likely to be introduced first in some Member States and then evaluated by both other Member States and the EU.

In the end, some authors speculate quite radically about the possibility of combining the proposed criterion of the value of the transaction with *the reversal*

[20] See Controle ex-post en matiere de controle des concentrations: avantages & inconvenients. *Concurrences – Antitrust Publications & Events*. October 16, 2019, [https://www.concurrences.com], accessed on 12/10/2020.

[21] Perrot, A.; Blonde, V.; Ropars, A.; Catoire, S.; Mariton, H.: *Rapport: La politique de la concurrence et les intérets stratégiques de l´UE*. République Francaise, Ministere de l´économie et des finances, Avril 2019.

[22] Article 6 of the EUMR allows the Commission to revise ex post a merger decision, but only in cases where undertakings have provided incorrect information or breached the conditions governing the authorization of a concentration.

[23] Interview with Etienne Chantrel, Head of Mergers Unit, Autorité de la concurrence, Paris. *Concurrences – Antitrust Publications & Events*. Decémbre 6, 2019, [https://www.concurrences.com], accessed on 12/10/2020. E. Chantrel also recalls that, under Clayton's Act, it is possible to revise merger results in the United States without a time limit. In other jurisdiction the intervention must take place within four or maximum twelve months from the merger.

of the burden of proof.[24] At present, according to Article 2 of the EUMR, it is the Commission that assesses and declares a concentration compatible or incompatible with the internal market, i.e. the Commission bears the burden of proof if it wishes to prohibit a concentration. According to the proposal, which would also require unanimous support in the Council, there would be a rebuttable presumption of incompatibility with the internal market against high-cost acquisitions. And it would be up to the undertakings concerned to prove that there is no threat to competition. Something similar already exists in the US, Canada, Japan, and at the Member State level in Germany and Sweden.

This is undoubtedly an elegant solution, although its effects may also be ambiguous. Indeed, the Commission would not suffer from information asymmetries, as it does today when it must decide on the possible future development of technology markets on the basis of information obtained primarily from their players. On the other hand, the burden of proof for companies in dynamically changing technological fields could be too heavy, as not all types and aspects of harms to competition by which the Commission would measure the evidence presented are sufficiently defined. The Commission is not yet in a position to announce all applicable theories of harm in advance, as this is a very novel and lively issue, especially in the online environment, depending on the development of new markets, business models, and their progressive analysis. Even at the national level, there are still not enough cases of bans on concentrations in online markets, from which it would be possible to conclude how serious and solvable the indicated problem is.

All the solutions discussed above have in common, besides their major or minor deficiencies, the need for a fundamental legislative change to the EUMR. This is a politically sensitive issue, as the Member States would have to agree unanimously to extend the powers of the European Commission and thus to its increased influence on the development of markets and their 'champions'. On the other hand, the Commission cannot be sure that, in the context of the amendment of the EUMR, the Member States will resist the temptation to establish political control of its decision-making by the Council, as was already suggested.[25] It is clear that the opening up of the legislative process entails considerable political risks in a situation when an ideal solution is not at hand, of which the Commission is surely aware. Probably, for this reason, as the most

[24] Motta, M.; Peitz. M.: *Challenges for EU Merger Control*. Discussion. Universitat Bonn – Universitat Mannheim: Paper N. 07 Collaborative Research Center Transregio 244, March 7, 2019, [https://www.crctr224.de/en], accessed on 12/10/2020.

[25] Bundesministerium fur Wirtschaft und Energie, Ministere de l´économie et des finances. *A Franco-German Manifesto for a European industrial policy fit for the 21st Century*, [https://www.bmwi.de], accessed on 12/10/2020.

achievable solution, the Commission is currently proposing a more active use of Article 22 EUMR, and thus a more frequent referral of concentration cases from the national to the European level (discussed in the next chapter). The following table summarizes the political difficulty of reaching the solutions discussed and, in a way, also explains the attractiveness of the solution currently being promoted by the Commission.

Changes enabling the EC to review „killer acquisitions “	Amendment of EUMR needed
1. The turnover of only one party to the transaction as criterion	YES
2. Introduction of transaction-value criterion	YES
3. Existing or acquired market /sales share as a criterion	YES
4. Reversal of the burden of proof regarding the (in) compatibility of the concentration with the EU internal market	YES
5. Introduction of an ex post control of acquisitions in terms of their real impact	YES
6. Introduction a sector-specific duty to review each merger	YES
7. A new approach to the application of Art 22 EUMR	**NO**

3. ARTICLE 22 EUMR – AN ANSWER HIDDEN IN PLAIN SIGHT?

Article 22 EUMR is historically called the “Dutch clause”, which explains its original *raison d’être*.[26] Countries such as the Netherlands or, for example, Italy and Luxembourg, were countries without a national merger control system at the time of the decision to adopt the first European Merger Regulation (4064/89), and there was a need to transfer mergers affecting competition in their markets to the European level. Consequently, under paragraph 1 of that Article any Member States „may request“ the Commission to examine the concentration that i) affects trade between the Member States, and ii) threatens to significantly affect competition within the territory of the Member State (or States) making the request. Logically, there is no condition that the requesting Member State must have the power to review the concentration under its national rules as the possibility of referral should exist especially for countries with no such rules.

[26] For explanation on art 22 EUMR and the system of referrals see in Rodriguez, J.: Merger Referrals under the EU Merger Regulation. An extract from *2011European Antitrust Review – a www.GlobalCompetitionReview.com Special Report*. Ryan, S.A.: The revised system of case referral under the merger Regulation experiences to date. *Competition Policy Newsletter.* No 3-Autumn 2005.

It is therefore relatively easy to fulfill criteria of the referral (concentration must be liable to have some discernible influence on the pattern of trade between the Member States and there should exist some prima facie evidence of its possible significant adverse impact on competition[27]), but only individual Member States can push the trigger if they want to. All the Commission can do is to „invite" the Member State(s) to make a request if it has the information that a certain concentration may fulfill the criteria for a referral.[28] It happened already several times that some Member States referred „their" case to the Commission while some others decided to deal with the concentration under their own national rules. It is thus important to stress that the Commission, taking over a concentration, deals with it on behalf of the requesting Member States. And those Member States only then lose their power to apply their national rules to the transaction, but not the other ones that did not refer the case to the Commission.[29]

The possibility to avoid this multi-level review of a concentration is provided by the rule mentioned in paragraph 16 of the EUMR preamble: *„Where a concentration capable of being reviewed under the competition laws of three or more Member States is referred to the Commission prior to any national notification, and no Member State competent to review the case expresses its disagreement, the Commission should acquire exclusive competence to review the concentration and such a concentration should be deemed to have a Community dimension. Such pre-notification referrals from Member States to the Commission should not, however, be made where at least one Member State competent to review the case has expressed its disagreement with such a referral."* So it is possible to rescue the „one-stop-shop" principle governing normally the review of concentrations (i.e. either the European or the national review not the two at the same time), but the condition is that no Member State competent to review the concentration disagree with the referral of it. So, in any case, the Commission cannot attract the cases from the national level at its own will and declare it of importance for the EU as a whole.

Art 22 EUMR then lays down the time periods within which the request have to be made and the Commission has to decide whether it will examine the

[27] Commission Notice on Case Referral in respect of concentrations (2005/C 56/02), paras 42-44.

[28] See Art 22(5) EUMR, op. cit. note 3.

[29] Only exceptionally the Commission will examine the effects of the concentration in the territory of not requesting Member States because such examination will prove to be necessary for the assessment of the effect of the concentration within the territory of the requesting Member States (i.e. in cases where the geographic relevant market would extend beyond borders of the requesting Member States). This however means that information can be requested from the non-referring Member States but not the compulsory referral of the case to the Commission. See in Commission Notice on Case Referral in respect of concentrations (2005/C 56/02), footnote 45.

case (which is important for requesting Member State as well as for companies concerned) and explains that the Member States where the concentration does not have to be notified must act (within 15 days) from the moment when the transaction has been only „otherwise made known to them".[30] This means that companies looking for certainty, if they cannot themselves try to transfer their concentration to the Commission under conditions of art 4(5) EMUR (compulsory review in at least three Member States[31]), then should informally approach all national competition authorities of Member States where they can reasonably expect some interest in their projected merger. An opposite alternative for them would be to hurry up and complete their otherwise non-notifiable merger before any referral from any Member State is made to the Commission. Because once the Commission decides to deal with the transaction, the standstill obligation applies, i.e. companies cannot proceed with their merger and must fulfill all their obligations under the EUMR review regime.

Maybe to avoid such uncertainty that could precipitate companies to hasty deals the Commission wanted in 2014 (to no avail) to amend article 22 EUMR so that only the Member States competent to review a merger under their national rules can request a referral.[32] But „the times they are a-changing'" and in September 2020 the Commission calls the article 22 EUMR an answer to killer acquisitions „that is hiding in plain sight" that allows without any legal changes to catch and review them at the EU level. M. Vestager acknowledged that „in recent years, the Commission has had a practice of discouraging national authorities from referring cases to us which they didn't have the power to review themselves", but from mid-2021 it would „start accepting referrals from national competition authorities of mergers that are worth reviewing at the EU level – whether or not those authorities had the power to review the case themselves."[33]

Statistics show that between September 21, 1990, and September 30, 2020, there were just 41 referrals from the Member States to the Commission and

[30] See Art 22(1) EUMR, op. cit. note 3.

[31] Art 4(5) EUMR allows to undertakings concerned to request the referral of their concentration, which is capable of being reviewed under the national competition laws of at least three Member States, to the Commission. No Member States with the jurisdiction over the concentration should disagree with that referral. If there is no objection the Commission acquires jurisdiction over the whole transaction as if it had the „Community dimension" and no Member State can apply its own rules to it.

[32] Analysis of Commissioner Vestager's announcement to accept referrals from NCAs for non-reportable concentrations. Antitrust Client Briefing published by Latham & Watkins, 18 September 2020, [https://www.lw.com/thoughtLeadership/article-22-eu-merger-referrals], accessed on 12/10/2020.

[33] Vestager, M. op. cit. note 6.

in 4 cases only they were rejected by the addressee.[34] Should we now expect a U-turn in the art 22 EUMR usage?

Law firms in briefs published on their websites quickly identified new risks for their clients born by such change in the Commission´s approach.[35] Before starting any discussion, it should be emphasized that the turnover or other thresholds are there to clearly separate cases when companies have the legal obligation to notify their mergers (and be ready to submit themselves fully to the scrutiny by the relevant authority) from the cases when they can merge without competition law brakes, formalities and sometimes also penalties. From mid-2021, however, they risk being required to fulfill all obligations under EUMR even if following the thresholds relevant for triggering the EU or the national merger reviews, they should have not been required to do so. It would be enough if a Member State upon invitation by the Commission refers to it as a concentration that fulfills the loosely worded criteria of Art 22.

From the companies´ point of view, this new Commission´s approach to Art 22 EUMR usage would bring about the necessity to carefully verify whether their envisaged concentration might anywhere in the EU fulfill the conditions of art 22 EUMR referral. They should beware that any Member State, even when the transaction is not to be filled under its national rules, may feel affected by the merger, and request the Commission. To be on the safe side the companies should themselves "make known" their intention to merge to all Member States that, based on the above-recommended verification, may be inclined to request the Commission. From that moment the companies could count 15 working days within which the referral has to be made and within which they must freeze their transaction. Then if the referral is made and accepted, they would be lucky if all Member States affected by the concentration join the request addressed to the Commission and no one of them decides to review the transaction under its national rules. The companies will then have to proceed with quite a burdensome notification to the Commission. This could of course delay the transaction, which cannot be completed due to the standstill obligation.

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[34] EU Open Data Portal. Merger Statistics, [https://data.europa.eu/euodp/en/data/dataset/mergers-statistics], accessed on 12/10/2020.

[35] For instance: Kuhn, T.; Wienke, T.-M.; Jourdan, J.; Czapracka, K.: *Catch-22: The European Commission Keeps Broadening Merger Control Intervention Powers and Gives a Glimpse of the Future*. Alert by White & Case September 17, 2020, [https://www.whitecase.com/publications/alert/catch-22-european-commission-keeps-broadening-merger-control-intervention-powers], accessed on 12/10/2020. Wünschmann, C.; Ritz, C.; von Schreitter, F.; Schöning, F.: *From „One Stop" To „Full Stop"? Far reaching changes in EU merger control announced*. Hogan Lovells, 21 Sep 2020, [http://hoganlovells-blog.de/2020/09/21/from-one-stop-to-full-stop-far-reaching-changes-in-eu-merger-control-announced/#], accessed on 12/10/2020.

All this looks rather unclear and uncertain by now. The Commission is expected to publish detailed guidance for companies and for Member States in which it would explain how to proceed within the limits of the present wording of art 22 EUMR that would not be changed. Without such guidance "relying on national referrals may be unsatisfactory and insufficient" even for the Commission as the experts who wrote the *Competition Policy for the digital era* report warned in 2019.[36] The referrals to the EU level may be quite unpredictable for everybody and the whole system may even switch „from one stop to full stop" if companies are deterred by the opacity of the new situation from considering their possible acquisitions or mergers.[37]

CONCLUSION

The present analysis inevitably leads to a conclusion that the solution to the „killer acquisitions problem", announced by the Commission in September 2020, is so far burdened with many uncertainties and risks, especially for companies. To be sure, no one argues that such type of acquisitions should pass unhindered by the EU competition law. Quite the contrary! It is the current Covid-19 pandemic that provided us with another evidence of our total dependence on global online platforms and their communication applications. The competition policy and law undoubtedly have a role to play in that sector in order to keep it open, dynamic, consumer-friendly, and thus preventing „killer acquisition" that would only strengthen its existing giants and close markets to new businesses and their ideas. However, the question remains whether the path indicated by the Commission is the right one, whether efforts to avoid a legislative change to the EUMR will not lead to an unsatisfactory result.

It is, of course, too early for a categorical conclusion. The Commission is undoubtedly examining now all the possibilities of interpretation of the existing legislation. It has a unique experience and intellectual capacity for this examination. Member States should consider their national solutions to remove uncertainty on the part of businesses. If potential killer acquisitions are compulsorily notifiable according to the innovated rules of the Member States (inspired, for example, by the experience of Germany and Austria with the value of the transaction threshold), the uncertainty that a referral is requested by a Member State in which the transaction did not need to be notified will be reduced. Perhaps it is a smart step made by the Commission to intensify the debate on possible changes by simply announcing a future U-turn in its approach

[36] Crémer, J.; de Montjoye, Y.-A.,; Schweitzer, H. op. cit. note 16, p. 113.

[37] Wünschmann, C.; Ritz, C.; von Schreitter, F.; Schöning, F. op. cit. note 35.

to art 22 EUMR. Businesses and experts will start calling for more clarity and certainty, which may put more and more pressure on finding better solutions. At the same time, it draws attention to all potential killer acquisitions from now on and may even discourage some predators from considering them.

Companies should stay vigilant and ask the Commission to guide their market behavior by clear and effective rules for the protection of competition. Perhaps they should rather lobby for a small change in the wording of the EUMR than look for an uncertain change in the Commission's approach to using the possibilities offered by Article 22 of the EUMR.

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