A critical assessment of the recent proposals and reports on the regulation of digital mergers

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Abstract

This article examines the recent proposals and reports on the regulation of digital mergers in the European Union, United Kingdom, United States and other jurisdictions, with a particular focus on the proposals for presumptions against mergers. It argues that any intervention in digital mergers needs to calibrate a balance between preventing excessive levels of market concentration and promoting innovation and that any departure from existing laws should be justified. Against this background, this article concludes that the recent arguments for lowering the threshold for blocking digital mergers undermines the risk of chilling innovation and losing significant efficiencies, and does not rely on concrete evidence and sound economic theories.

Keywords: digital mergers, regulation, presumption of harm, innovation, efficiency, economic theory

1. Introduction

In recent years, the characteristics and complexities of digital markets have sparked debate and challenged the traditional approaches to merger control.[1] Hence, it has come as no surprise when big tech mergers and acquisitions in which established businesses buy

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[1] The European Commission has been assessing the functioning of different aspects of EU merger control. see Commission, Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control (Commission Merger Consultation), available at: https://ec.europa.eu/competition-policy/public-consultations/2016-merger-control_en [accessed 5 August 2021].

promising start-ups on a scale, have gained considerable attention in policy circles over recent years. Accordingly, there have been significant steps taken, particularly in the European Union, the United Kingdom and the United States, as well as in many other jurisdictions, to regulate mergers in digital markets.

Just as is the case in any competition law intervention, there exists a trade-off in regulating digital mergers. On the one hand, digital mergers are important to promote economic efficiency on the basis that merging firms complement their input and innovation capabilities, which enables them to accelerate the development of innovations,[2] reduce their costs and utilize network effects through these mergers.[3] Over-enforcement against digital mergers entails the risk of (i) losing these efficiencies by prohibiting pro-competitive digital transactions, which is the case for most of them,[4] and (ii) hindering the market entry of innovative start-ups that are financed by venture capital firms who are motivated by the possibility of a buyout by the digital giants.[5] On the other hand, there are arguments that dominant platforms may use these transactions as a strategy to (i) eliminate their potential rivals,[6] (ii) obtain market power in a related market,[7] (iii) strengthen their market positions and/or raise barriers to entry in both their own market and an adjacent market through

[2] J. Krämer, 'Introduction' in J. Krämer (ed), *Digital markets and online platforms* (CERRE, November 2020), p.19, available at: https://cerre.eu/wp-content/uploads/2020/11/CERRE_Digital-markets-and-online-platforms_new-perspectives-on-regulation-and-competition-law_November2020.pdf [accessed 5 August 2021].

[3] M. Holmström, J. Padilla, R. Stitzing, and P. Sääskilahti, *Killer Acquisitions? The Debate on Merger Control for Digital Markets*' (2018) Yearbook of the Finnish Competition Law Association (2018) 1, pp.18-19, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3465454 [accessed 5 August 2021].

[4] J. Crémer, Y-A de Montjoye and H. Schweitzer, *Competition Policy for the Digital Era*, (2019) (Crémer Report) p.111, available at: https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf [accessed 5 August 2021]; J. Furman et al, *Unlocking digital competition, Report of the Digital Competition Expert Panel* ' (March 2019) (Furman Report), paras 3.106, 3.38, available at: https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel [accessed 5 August 2021].

[5] J. Gans, D. Hsu and S. Stern, *When Does Start-Up Innovation Spur the Gale of Creative Destruction?*' [2002] 33 RAND Journal of Economics 571, 571-586, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=338221 [accessed 5 August 2021].

[6] Crémer Report (fn 4), p.111; Furman Report (fn 4), p.11. See also the discussion in e.g. Case ME/5525/12 *Facebook/Instagram* (14 August 2012).

[7] Furman Report (fn 4), p.11; see also the discussion in e.g., Case M.4731 *Google/Doubleclick* (11 March 2008).

acquiring data-driven businesses that are active in the adjacent market,[8] and (iv) foreclose access to inputs.[9]

This article aims to provide insight into whether the proposals for regulating digital mergers take into account the important trade-off between, on the one hand, innovation and efficiency and, on the other hand, market concentration. It examines the proposed thresholds for mandatory notification of mergers and the arguments for change in the substantive assessments of mergers, with a particular focus on recommended presumptions about the anti-competitiveness of digital mergers. Accordingly, Part II summarizes the recent proposals for regulation in the EU, UK, US and other jurisdictions, and Part III compares and analyses them in a critical manner.

Against this background, the article concludes that recent proposals on lowering the threshold for blocking digital mergers seem to focus on market concentration, as opposed to efficiency and innovation, and undermine the risk of over-enforcement with respect to innovation and economic efficiency. It also finds that the proposals fail to provide concrete supporting evidence regarding the need for imposing presumptions for challenging digital mergers.

2. Recent developments in the regulation of digital mergers in various jurisdictions

2.1. Under the EU merger regime

The EU has been making a great deal effort to strengthen the procedural and jurisdictional aspects of EU merger control, and its proposed regulations on digital mergers focus on two issues, namely, (i) the jurisdictional thresholds and (ii) the substantive assessment of transactions.

[8] Furman Report (fn 4) 11; see the discussion in e.g., Case M.6381 *Google/YouTube* (13 February 2012), Case M.7217 *Facebook/WhatsApp* (3 October 2014) and Case M. 9660 *Google/Fitbit* (15 June 2020).

[9] Crémer Report (n 4), p.111; see also the discussion in e.g. Case M. 8788 *Apple/Shazam* (6 September 2018) and Case M.6967 *BNP Paribas Fortis/Belgacom/Belgian Mobile Wallet* (11 October 2013) .

The first concern regarding digital mergers within the EU is that the current turnover-based jurisdictional thresholds of the EU Merger Regulation might fail to capture the acquisition of high potential firms with low or even no monetary turnover.[10] Indeed, the mandatory notification obligations under the EU Merger Regulation only apply to concentrations with a 'Union dimension', i.e. where the undertakings concerned meet the relevant turnover thresholds.[11] However, most digital start-ups do not prioritize earning short-term profits or achieving turnover growth. Instead, because they want to be the first to benefit from network effects, and since the market might tip in their favour, digital start-ups opt for a business model mostly based on offering a product that would attract large numbers of users, that is intended to be the base for monetizing the innovation at a later stage.[12] Accordingly, their competitive potential is not reflected in their revenues and acquisitions of them are not caught by the jurisdictional test.[13] It is for this reason that cases like *Facebook/Instagram,*[14] where the dominant social-networking services provider acquired a photo-sharing platform, and *Google/Waze,*[15] where the dominant internet search engine which had its own mapping database acquired a free map application provider, were not scrutinized by the European Commission (Commission).

Although it is an established fact that most mergers fly under the radar of the EU Merger Regulation, it is controversial whether the turnover-based jurisdictional thresholds should be modified or at least updated. While some argue that there is a strong need for a supplementary transaction value test,[16] the Crémer Report for the European Commission disagrees with this view.[17] Indeed, the Crémer Report suggests that it is better not to amend the jurisdictional test at this stage, considering the need to refrain from increasing the

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[10] See Commission Merger Consultation (fn 1).
[11] For the Union-wide turnover thresholds, see Council Regulation 139/2004 on the control of concentrations between undertakings (EU Merger Regulation) [2004] O.J. L 24/1, art.1(2) and (3).
[12] M. Bourreau and A. de Streel, *Digital Conglomerates and EU Competition Policy* (2019), p.32, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3350512 [accessed 5 August 2021].
[13] Crémer Report (fn 4), p.113.
[14] *Facebook/Instagram* (fn 6).
[15] Case ME/6167/13 *Google/Waze* (11 November 2013).
[16] Bourreau and de Streel (fn 12), p.32.
[17] Crémer Report (fn 4), pp.113-114.

administrative burden and transaction costs which an extension of jurisdiction would trigger, given that mergers may be reviewed following referrals under Article 22 of the EU Merger Regulation by Member States, including those which have already imposed jurisdictional tests based on transaction value.[18] Indeed, the Commission considers that a merger can be referred to it under Article 22, even if it is not notifiable under the national laws of the referring Member State (or States).[19]

That said, the Commission seems to be moving towards adopting new rules that might actually give rise to the burdens mentioned. Indeed, in its recent proposal for the Digital Markets Act, of 15 December 2020 (DMA Proposal),[20] which is intended to regulate those digital platforms with certain market power, the Commission envisages a two-step process in which the provider of a core platform service, i.e. online intermediation services, online search engines, online social networking services, cloud computing services, video-sharing platform services or operating systems,[21]. As a first step, the Commission will designate a provider as a 'gatekeeper', based on certain quantitative factors such as the number of users, turnover, market capitalization and monthly activity.[22] As a second step, a designated gatekeeper must adhere to list of obligations that apply to all gatekeepers.[23] According to the obligations proposed, those platforms will be required to notify all of their intended transactions, before closing the transaction, regardless of whether they are subject to merger control under national laws or the EU Merger Regulation.[24]

The second concern on digital mergers, within the jurisdiction of the EU, is about the economic approach used to assess mergers in digital markets and whether this approach is sufficient to identify competition concerns that may potentially arise. Under the EU regime,

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[18] Crémer Report (fn 4), pp.113-114.
[19] Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases (C(2021) 1959 final, 26 March 2021).
[20] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) (COM(2020) 842 final, 15 December 2020) (DMA Proposal).
[21] DMA Proposal (fn 20), art. 2(2).
[22] DMA Proposal (fn 20), art. 3.
[23] DMA Proposal (fn 20), arts 5 and 6. See C. Caffarra and F. Scott Morton, 'The European Commission Digital Markets Act: A translation', *VoxEU* (5 January 2021), available at: https://voxeu.org/article/european-commission-digital-markets-act-translation [accessed 5 August 2021].
[24] DMA Proposal (fn 20) art.12.

the test applied for the review of transactions is the significant impediment to effective competition test (SIEC test).[25] When the activities of the transaction parties are either vertically-related or complementary (i.e. a non-horizontal merger), the transaction is likely to be considered pro-competitive and the theory of harm under the SIEC test is limited to the foreclosure and coordinated effects.[26] Foreclosure occurs if actual or potential rivals are restricted in terms of their access to inputs or customers.[27] The concern about digital mergers thus is that dominant platforms might use mergers as a way to create an ecosystem of complementary products in which the main products and/or services are insulated from competitive pressure.[28]

With an emphasis on high levels of market concentration, barriers to entry resulting from network effects and the possession of significant amount of data, the Crémer Report argues that digital mergers may cause competitive harm even if there is no concern stemming from overlapping activities, since relevant transactions may enable the dominant firm to expand the ecosystem it controls, which eventually might result in an increase in barriers to entry, through isolating the dominant firm's core services from competition and thus preventing the entry of potential innovators into the market.[29] It further argues that digital firms may use mergers systematically to acquire potential rivals.[30] However, the scenario here is different to that of a typical 'killer acquisition', where the potential innovator (the target business) is acquired in order that the purchaser can cease its innovation. Although there may be examples of killer acquisitions in digital markets, the more prevalent scenario in these markets is that the target is acquired in order to integrate its product into the existing, complementary products of the dominant firm.[31] Because such an integration may provide efficiencies and it is difficult to establish whether the target would have developed into a

[25] EU Merger Regulation (fn 11) art.2.
[26] Commission Guidelines on the assessment of non-horizontal mergers [2008] O.J. C 265/6, paras 11-22; see also the Crémer Report (fn 4), pp.116-120.
[27] Guidelines on non-horizontal mergers (fn 26) para 17-22.
[28] Crémer Report (fn 4), pp.116-120.
[29] Crémer Report (fn 4), pp.116-117.
[30] Crémer Report (fn 4), p.117.
[31] Crémer Report (fn 4), p.117.

competitor providing the core service of the acquirer in the relevant time period, the transaction is often analyzed as a conglomerate merger (hence under the theories related to conglomerate effects) as opposed to a horizontal merger in which potential competition is prevented.[32]

Therefore, the Crémer Report finds that although the SIEC test is sufficient for analyzing digital mergers, the theories applied under this test may not be appropriate for the analysis.[33] Thus, it proposes to inject 'horizontal' elements into the conglomerate theories of harm.[34] For this, it suggests that competition authorities should consider whether the parties are active in the same 'technological space' or 'users' space' and, if this is the case, they should then apply a horizontal merger assessment and decide whether the target is an actual or potential competitor in the relevant wide ecosystem.[35] The Crémer Report goes further by stating that if the authority finds, based on such an assessment, that the elimination of the target will strengthen the market power of the acquirer, the parties must prove the efficiencies that would be created by the merger.[36] The Crémer Report emphasizes that this is not a presumption against mergers.[37] However, by blurring the boundaries of the 'markets' under scrutiny and imposing the burden of proof on the parties, it does considerably lower the threshold for prohibiting digital mergers.

As an example of how the proposal may work in practice, the Crémer Report analyzes the Commission's decision in *Facebook/WhatsApp*.[38] In this decision, the Commission found that even in the broader market for social networking services, WhatsApp would not have become a competitor to Facebook because it could not provide the wide range of services that are normally offered by social networking services providers, due its limited functionalities.[39] The Crémer Report argues that, to challenge the transaction, the Commission would have

[32] Crémer Report (fn 4), pp.116-118.
[33] Crémer Report (fn 4), pp.116-117 and 122.
[34] Crémer Report (fn 4), pp.117 and 122.
[35] Crémer Report (fn 4), pp.117 and 122.
[36] Crémer Report (fn 4), pp. 116-117.
[37] Crémer Report (fn 4), p. 124.
[38] Case M.7217 *Facebook/WhatsApp* (3 October 2014)).
[39] *Facebook/WhatsApp* (fn 38), paras 52-54.

needed to adopt a broader market definition of networking services that would have included the services of WhatsApp .[40] Nevertheless, it does not explain why prohibiting the transaction based on such an assessment would have provided better outcomes in terms of efficiency or consumer welfare.

The DMA Proposal does not provide information on if and how the Commission would review mergers involving dominant gatekeepers, for example the theory of harm that it would apply. Thus, it is not known yet whether the Commission would follow the Crémer Report regarding the change of the substantive assessment. Therefore, with the aim of providing solutions to the concerns raised within the EU, the DMA Proposal introduces a change in the jurisdictional threshold applying to digital mergers, while remaining silent about the substantive test to be used to assess mergers.

2.2. Under the UK merger regime

The concerns raised by the Competition and Markets Authority (CMA) and those in the reports published on the UK regime are in line with those discussed in relation to the EU merger regime. However, the CMA has its own distinct approach on this front, being shaped by the statement of intentions in the Unlocking Digital Competition Report, prepared by an expert panel and published by the UK Government on 13 March 2019 (Furman Report).[41] The distinguishing feature of the UK merger regime in general is that notifying the merger is voluntary, although the CMA may scrutinize any transaction if it deems that there is any potential competitive concern, provided that the transaction meets the jurisdictional criteria.[42] The Furman Report underlines that Amazon, Apple, Facebook, Google and Microsoft have completed over 400 transactions globally, none of which were prohibited by the CMA.[43] Furthermore, close to 250 of these transactions took place in the last 5 years and, again, none

[40] Crémer Report (fn 4), p.118.
[41] Furman Report (fn 4).
[42] Enterprise Act 2002, s. 28; see also *Guidance on the CMA's mergers intelligence function* (CMA56revised, December 2020), para 1.2.
[43] Furman Report (fn 4), p.91.

of them were notified to the CMA.[44] Although the Furman Report alleges that these numbers indicate 'underenforcement', it also acknowledges that the CMA considered whether to commence an 'own initiative' investigation into almost 30 of these transactions to review, but found that there was no potential concern that required further scrutiny.[45]

With regard to the jurisdictional test, there are two alternative tests applied: the 'turnover test' and the 'share of supply test'. The turnover test requires that the target enterprise must have turnover of at least £70 million in the UK,[46] which might not capture the acquisition of an undertaking in the early stages of business.[47] However, the share of supply test is likely to capture these transactions if the merging parties' activities overlap and the parties will have a share of supply of at least 25% of any description of goods or services provided in the UK or a substantial part of it.[48] The Furman Report found that there was no need to change the jurisdictional test, since the share of supply test, in fact, enables the CMA to exert jurisdiction over high-value conglomerate digital mergers. Some of these mergers, i.e. *Facebook/Instagram*[49] and *Google/Waze*[50] were investigated by the CMA and some others were not 'called in' for further review due to a lack of competitive concerns.[51] Nevertheless, the Furman Report recommended that firms designated with 'strategic market status'[52] should be required to notify the CMA of all contemplated transactions.[53]

On the other hand, the Furman Report recommended that the substantive test to be applied in assessing digital mergers should be revised.[54] The test used under UK law is the substantial lessening of competition (SLC) test. Pursuant to the CMA's Merger Assessment

[44] Furman Report, (fn 4), p. 91.
[45] Furman Report, (fn 4), pp. 91-92.
[46] Enterprise Act 2002, s.23(1)
[47] Furman Report (fn 4), p.94.
[48] Enterprise Act 2002, s.23(2)-(8).
[49] *Facebook/Instagram* (fn 6).
[50] *Google/Waze* (fn 15).
[51] Furman Report (fn 4), p.94.
[52] The report does not provide a definition of the relevant status and focuses on a case-by-case designation. Nevertheless, it refers to 'hold[ing] a high degree of power over how their users access the market' and a powerful negotiating position See Furman Report (fn 4), p.59.
[53] Furman Report (fn 4), p.95.
[54] Furman Report (fn 4), p.97-101.

Guidelines, to block a merger the CMA must establish that the competitive harm is more likely than not or occur, i.e. on the balance of probabilities.[55] The Furman Report argues that, this approach may lead to false positives in mergers in digital markets because the possibility that the target may become a rival to the acquirer is likely to be very low, whereas the potential harm that may result from such transactions is very high.[56] The Furman Report thus recommended changing the approach of assessing the competitive harm of a merger from the balance of probabilities to a new approach called 'balance of harms', which would make it possible to prohibit a merger based on a potential harm with a low-probability of occurring, but a high impact if it did occur.[57] The Furman Report considered that this would not mean applying a presumption against mergers.[58]

In its report of 1 July 2020 (CMA Report) assessing the practical application of the Furman Report,[59] the CMA stated that although it was of the view that current UK law is sufficient to address the concerns about digital mergers, it may update its Merger Assessment Guidelines[60] to modify its tools to prevent consumer harm arising from mergers. The UK Government has published its response to the CMA Report, including a statement that merger assessments would be updated through legislative changes, if this was deemed to be necessary.[61]

Finally, on 8 December 2020, the CMA published its advice to the UK Government (CMA's Advice)[62] which introduces a new 'Strategic Market Status' (SMS) regime.

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[55] CMA, *Merger Assessment Guidelines* (CMA129, 18 March 2021) paras 2.31 to 2.36.
[56] Furman Report (fn 4), pp.97-99.
[57] Furman Report (fn 4), pp. 99-101.
[58] Furman Report (fn 4), p.12.
[59] CMA, *Online platforms and digital advertising: Market Study* (Final Report, 1 July 2020), available at: https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf [accessed 22 June 2021].
[60] Merger Assessment Guidelines (fn 55).
[61] Department for Business, Energy & Industrial Strategy, *Response to the CMA's market study into online platforms and digital advertising* (17 November 2020), p.12, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939008/government-response-to-cma-study.pdf [accessed 22 June 2021].
[62] CMA, A new pro-competition regime for digital markets: Advice of the Digital Markets Taskforce' (CMA135, December 2020), available at: https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice.pdf [accessed 22 June 2021].

Accordingly, if, based on an evidence-based economic assessment, "a firm has substantial, entrenched market power in at least one digital activity, providing the firm with a strategic position" (i.e. its market power has a substantial impact on the market), it would be regarded as having strategic market status.[63] Thus, the status and the new regime differ from dominance and the competition law regime applying to dominant firms.

In regard to the jurisdictional criteria, the CMA's Advice provides that the share of supply test, although useful to capture transactions on the acquisition of potential competitors who did not generate much turnover, falls short of capturing mergers where the relationship between the activities of the transaction parties do not overlap horizontally.[64] The CMA's Advice also concludes that the voluntary nature of the UK merger control entails the risk of an inability to put remedies into effect if competition concerns are identified.[65] That is because, under the current system, the CMA may commence an 'own initiative' investigation of a transaction only after the parties have already closed it. In such cases, the CMA would typically impose an 'interim enforcement order', which obliges the parties to hold separate their businesses from each other and to cease further integration. The CMA's Advice states that the 'most powerful digital firms' have a complicated and interconnected structure which makes it difficult in practice to separate the businesses once they are integrated.[66] Therefore, the CMA's Advice proposes revising the criteria for SMS firms by obliging them to *report all intended* acquisitions to the CMA, irrespective of whether they are notifiable under the UK merger control regime.[67] The CMA's Advice states that even if the transaction does not trigger a mandatory notification obligation, the CMA should be able to review the acquisition and analyze whether any competition concerns are raised.[68] Also, transactions made by SMS firms should be made subject to mandatory merger control notification (i.e. be the parties should be

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[63] CMA's Advice (fn 62), pp.5-6.
[64] CMA's Advice (fn 62), p.57.
[65] CMA's Advice (fn 62), p.58.
[66] CMA's Advice (fn 62), p.58.
[67] CMA's Advice (fn 62), p.58.
[68] CMA's Advice (fn 62), p.59.

prohibited from closing the transaction before obtaining the approval) provided that they meet clear-cut threshold tests. For the threshold, the CMA's Advice proposed that the materiality of a transaction (and thus whether it should be notifiable) should be assessed by reference to its transaction value.[69]

The CMA's Advice also proposes a new regime for the review process. Accordingly, if it can easily be found that the activities of the parties do not have any competitive interaction, conducting a simplified notification process would suffice to eliminate competition concerns.[70] However, in principle, the mergers would be assessed under an in-depth Phase-II investigation to allow a thorough analysis.[71]

As to the test to be applied to the analysis of mergers, the CMA's Advice provides that "*[c]ompetition concerns should be assessed using the existing substantive test* [SLC test] *but to a lower and more cautious standard of proof."*[72] Following the recommendation of the Furman Report, the CMA's Advice states that proving an SLC on a 'more likely than not' basis is likely to be particularly challenging in digital mergers, since there is more uncertainty about how the digital markets are likely to develop in future.[73] Hence, authorities should be able to prohibit a merger even when competitive harm is not likely to arise based on the balance of probabilities approach but would on a balance of harms approach.[74]

2.3. Under the US merger regime

After a long discussion on whether the US antitrust laws are fit to address anti-competitive conducts within the digital markets, recent proposals made in the US to address digital mergers have recommended certain changes that would make it easier to challenge mergers involving digital firms by way of relaxing substantive standards of assessment and

[69] CMA's Advice (fn 62), pp.59-60.
[70] CMA's Advice (fn 62), p. 61.
[71] CMA's Advice (fn 62), p.62 and fn 63.
[72] CMA's Advice (fn 62), p.62.
[73] CMA's Advice (fn 62), p.62-63.
[74] CMA's Advice (fn 62), p.62-63.

reversing the burden of proof so that the transactions are presumed to be unlawful unless the merging parties can show otherwise.

Under the existing US merger control regime, the thresholds for mandatory filing under the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act) are based on the value of the transaction and the size of the annual net sales or total assets of the ultimate parent entities of the transaction parties.[75] However, even those transactions that do not trigger these thresholds may be subject to review if they infringe the relevant antitrust rules.[76] Transactions may be 'called in' for a review even after consummation.[77] For example, the Federal Trade Commission (FTC) recently requested information from Microsoft, Google, Apple, Facebook and Amazon about the transactions they have completed in the last ten years with the aim of conducting an *ex-post* analysis. While doing so, the FTC also indicated that it may take further enforcement actions following its analyses.[78]

Nevertheless, the arguments that neither the test based on transaction value nor the possibility of *ex-post* review are sufficient to address the concerns about digital mergers led to new proposals for legislative reform. Accordingly, Cunningham et al. argue that transactions targeting the elimination of potential rivals do often evade the thresholds set out under the HSR Act, for example by way of valuing transactions just below the thresholds.[79] Further, the report of the Stigler Center's Committee for the Study of Digital Platforms Market Structure

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[75] Hart-Scott-Rodino Antitrust Improvements Act 1976 15 U.S.C. § 18a.
[76] Clayton Act 15 U.S.C. § 18 (1914), s. 7; Sherman Antitrust Act 15 U.S.C. §§ 1-7, ss. 1 and 2; Federal Trade Commission Act 15 U.S.C. §§ 41-58, s.5.
[77] See e.g. *United States v Bazaarvoice Inc.*, (2 December 2014); see also US District Court for N.D. of California, 'Competitive Impact Statement on *US v Bazaarvoice Inc.'* (8 May 2014), available at: https://www.justice.gov/atr/case-document/file/488826/download [accessed 22 June 2021] (on the Bazaarvoice/Power Reviews merger which, although not exceeding the thresholds for notification, was challenged by the U.S. Department of Justice after consummation and the buyer was required to divest the assets acquired as result of the merger).
[78] FTC press release, *FTC to Examine Past Acquisitions by Large Technology Companies* (11 February 2020). The FTC issued special orders under s.6(b) of the Federal Trade Commission Act to Alphabet Inc. (including Google), Amazon.com, Inc., Apple Inc., Facebook, Inc., Google Inc., and Microsoft Corp., requiring them to provide information and documents on the terms, scope, structure, and purpose of transactions that each company consummated between 1 January 2010 and 31 December 31 2019.
[79] C. Cunningham, F. Ederer and S. Ma, *Killer Acquisitions* (2021) 129 Journal of Political Economy 649, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3241707 [accessed 5 August 2021].

and Antitrust Subcommittee, published on 1 July 2019 (Stigler Report)[80] states that the competition authorities' ability to intervene in a merger will be limited after closing and, in order to prevent the loss of the opportunity of the acquired firm developing into a rival, firms that are found to have 'bottleneck power'[81] should be required to notify their transactions before closing, regardless of the size of the transaction.[82] Similarly, the US House of Representatives Majority Staff Report on Investigation of Competition in Digital Markets (US Majority Staff Report), published on 6 October 2020 with the aim of providing advice to the US Congress, recommended that all transactions of the 'dominant platforms' must be notified to the antitrust agencies.[83] Finally, the draft Trust-Busting for the Twenty-First Century Act introduced by Senator Josh Hawley on April 12, 2021 proposes amending the scope of the notification obligation set out under the US merger regime and requiring firms that are designated as "dominant digital firms" by the FTC [84] to notify all of their transactions as required by s.7 of the Clayton Act. [85]

With regard to the substantive test to be applied, the discussion about the acquisition of nascent firms led to the emergence of proposals for applying a presumption against certain mergers.[86] In fact, imposing presumptions against mergers is not an unfamiliar concept in US jurisprudence, since a structural presumption has already been established in *United States v. Philadelphia National Bank* which enables the authority to block mergers in concentrated

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[80] George J. Stigler Center for the Study of the Economy and the State, *Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee Report* (15 May 2019), available at: https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf?la=en&hash=E08C7C9AA7367F2D612DE24F814074BA43CAED8C [accessed 22 June 2021].

[81] 'Bottleneck power' is defined as '*a situation where consumers primarily single-home and rely upon a single service provider (a "bottleneck"), which makes obtaining access to those consumers for the relevant activity by other service providers prohibitively costly*': Stigler Report (fn 80), p.105.

[82] Stigler Report (fn 80), pp. 33, 111 and 114.

[83] J. Nadler and D. Cicilline, *Investigation of Competition in Digital Markets*, Majority Staff Report and Recommendations' (2020), p.388, available at: https://www.documentcloud.org/documents/7222836-Investigation-of-Competition-in-Digital-Markets.html [accessed 5 August 2021].

[84] Under the Trust-Busting for the Twenty-First Century Act S. 1074 117th Cong. (2021) § 10A, FTC may designate a firm as "a dominant digital firm" if it (1) "provides a website or service accessible through the internet; and (2) possesses dominant market power in any market related to that website or service".

[85] The Trust-Busting for the Twenty-First Century Act (fn 84) § 3.

[86] N. Phillips, 'Looking Back to the Future: What the Past Can Tell Us About the Future of Antitrust', speech to the Technology Policy Institute: Is the Platform Economy Forcing Us to Reconsider Antitrust Enforcement?, Washington DC (15 November 2018), p.3, available at: https://www.ftc.gov/public-statements/2018/11/looking-back-future-what-past-can-tell-us-about-future-antitrust [accessed 5 August 2021].

markets, unless the transaction parties prove that the transaction would not create any anti-competitive effects.[87] Similarly, the Stigler Report recommended that when a merger involves a dominant platform the burden of proof should be reversed.[88] To provide an insight, particularly a theoretical background for this change, the Stigler Report calls for a paradigm shift in antitrust. On this note, the Stigler Report notes the view of the Chicago School on the trade-off between Type I errors (i.e. a finding that conduct that is actually pro-competitive violates the antitrust laws) and Type II errors (i.e. a failure to find antitrust liability for anti-competitive conduct).[89] As is known, and has been generally accepted over the last decades, the Chicago School subscribes to the idea that markets will generally quickly self-correct and that antitrust scrutiny should therefore be very limited and not scaled-up; thereby preferring Type II errors over Type I errors.[90] This view has led the U.S. antitrust authorities to take a cautious approach against intervention.[91] However, the Stigler Report further states that the tolerance of antitrust law for underenforcement should be reassessed and recalibrated, given that self-correction may be unlikely in digital markets since the entry and innovation are prevented by dominant platforms.[92]

The US Majority Staff Report also supports the same argument for shifting the burden of proof when the transaction involves the acquisition of a potential or nascent competitor or a start-up,[93] or is conducted by a dominant platform.[94] Similar to the Stigler Report, it asserts that the 'rule of reason' analysis, which gained popularity in the last decades and led to a departure from presumptions in merger control, works disproportionately in favour of defendants, rather than diminishing the possibility of error in assessment.[95] To support its view, the authors of the US Majority Staff Report argue that the dominant platforms benefitted

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[87] *United States v. Philadelphia National Bank* 374 U.S. 321 (1963).
[88] Stigler Report (fn 80), p.93.
[89] Stigler Report (fn 80), p.80.
[90] Stigler Report (fn 80), pp.92-93.
[91] Stigler Report (fn 80), p.84.
[92] Stigler Report (fn 80), pp.84-85.
[93] US Majority Staff Report (fn 83), p.394.
[94] US Majority Staff Report (fn 83), p.388.
[95] M. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century* (2009) 16 George Mason Law Review 827.

from mergers to obtain their current market power.[96] To substantiate this argument, they refer to the internal documents of dominant platforms which reveal their intention, through acquisitions, to eliminate a competitive threat or to build an ecosystem that is insulated from competitive threats,[97] referring to for example, Facebook's plans about acquiring Instagram[98] and Google's plans about acquiring DoubleClick.[99]

Importantly, the presumption recommended by the US Majority Staff Report differs from that proposed by the Crémer Report in the EU.[100] The US Majority Staff Report's recommendation would deprive the firms of the ability to prove efficiencies which outweigh the possible (or *assumed,* considering the proposed presumption) anti-competitive effects of the transaction.[101] Accordingly, once certain thresholds are crossed, the only way to disprove the presumption is to show that the transaction does not result in any anti-competitive effect; hence, the merger will be prohibited due to the presumption that it is anti-competitive even if it results in significant efficiencies. Another part of the US Majority Staff Report about how the presumption may be denied, does not even refer to competitive harm, stating that the presumption may only be rebutted by showing that '*the transaction was necessary for serving the public interest and that similar benefits could not be achieved through internal growth and expansion.*'[102]

In addition to this presumption, the US Majority Staff Report recommended that s.7 of the Clayton Act, which prohibits transactions whose effect 'may be to substantially to lessen competition, or to tend to create a monopoly, should be revised to enable the antitrust agencies to establish harm on potential or nascent competition, without have to prove that the potential rival would have, in the counterfactual (or 'but for' scenario) have successfully entered the

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[96] US Majority Staff Report (fn 83), pp.387-388.
[97] US Majority Staff Report (fn 83), pp. 149 and 392.
[98] See US House of Representatives, *The Television Broadcasting Industry: Report of the Antitrust Subcommittee of the Commission on the Judiciary'* No. 607 (1957) 143; see also US Majority Staff Report (fn 83), p.149.
[99] See submission from Google to House of Commission on the Judiciary GOOG-HJC-04189347 (26 July 2006)) (on file with Commission) cited in US Majority Staff Report (fn 83), p.208.
[100] See Crémer Report (n 4), pp.116-117.
[101] US Majority Staff Report (fn 83), 393.
[102] US Majority Staff Report (fn 83), p.388.

market.[103] The US Majority Staff Report proposes that the wording of s.7 should be revised so that transactions which 'may lessen competition or tend to increase market power' may be prohibited.[104] Finally, the Report recommends a departure from existing practice by exploring new presumptions about anti-competitive impact of vertical mergers when one of the parties of the transaction holds a dominant position in the market.[105]

In line with the US Majority Staff Report, the recent bills introduced by the Senate and the House of Representatives propose applying presumptions against digital mergers. Pursuant to the draft Competition and Antitrust Law Enforcement Act unveiled by five senators on February 4, 2021, if either transaction party has assets, net annual sales, or a market capitalization greater than $100 billion and the acquisition concerns more than $50 million of the total securities or assets of the target, such an acquisition would be deemed anticompetitive unless the acquirer proves that any harm to competition would be *de minimis*.[106] The draft Trust-Busting for the Twenty-First Century Act proposes a more extreme approach by prohibiting any acquisitions of companies regardless of the transaction value in case the market capitalization of the acquirer is greater than $100 billion and the transaction "may be to lessen competition in any way".[107] Another Senate Bill, the draft Tougher Enforcement Against Monopolies Act proposed on June 14, 2021, introduces one "rebuttable" and one "irrebuttable" presumption.[108] Accordingly, the Department of Justice (DOJ) may presume a transaction may substantially lessen competition or tend to create a monopoly if it proves that the transaction parties "compete, would compete, or would attempt to compete against each other, absent the transaction" and the transaction (i) would enable the combined undertaking to "meaningfully" increases prices or reduces output, innovation, or quality in a market or (ii) would lead to a post-Transaction market share of more than 33%. The presumption may be

[103] US Majority Staff Report (fn 83), p.394 (stating that nascent competitors are firms whose 'prospective innovation represents a serious future threat to an incumbent').
[104] US Majority Staff Report (fn 83), p.394.
[105] US Majority Staff Report (fn 83), p.395.
[106] Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225 117th Cong. (2021) § 4.
[107] The Trust-Busting for the Twenty-First Century Act (fn 84) § 3.
[108] See the Section Headings of Tougher Enforcement Against Monopolies Act, S. 2039 117th Cong. (2021) § 7(c)(2) and 7(c)(3) (being "rebuttable" and one "irrebuttable" presumption respectively).

rebutted by proving that (i) the combined undertaking would not be able to exercise market power or (ii) the anticompetitive impact is immaterial or (iii) the procompetitive effects clearly outweigh the anticompetitive impact.[109] Nevertheless, if the transaction parties "compete, would compete, or would attempt to compete against each other, absent the transaction" and the combined entity's market share would exceed 66%, then the transaction may be barred unless the "the transaction is necessary to prevent serious harm to the national economy".[110] Finally, the draft Platform Competition and Opportunity Act of 2021 introduced by the House of Representatives on June 11, 2021, prohibits "covered platforms"[111] from acquiring any commercial entity unless they prove that (i) the target is not an actual, potential or nascent competitor of the platform or its operator and (ii) the transaction does not enhance or increase the platform or its operator's market power or their ability to maintain their market power with respect to the supply of products and services provided on or "directly related to" the platform.[112]

As a final note, the Federal Trade Commission (FTC) has sued Facebook seeking the unwinding of the acquisitions of Instagram and WhatsApp, with the claim that Facebook conducted these transactions to eliminate competitive threats.[113]

2.4. A summary of recent developments in the regulation of digital mergers of other jurisdictions

New legislation for regulating digital mergers appear to be on the horizon in other jurisdictions as well; some have already made significant changes in their merger control regimes. Lowering or abolishing the thresholds for notification seems to be the most common

[109] Tougher Enforcement Against Monopolies Act, (fn 108) § 7(c)(2).
[110] Tougher Enforcement Against Monopolies Act (fn 108) § 7(c)(3).
[111] A status designated based on the number of United States-based monthly active users or United States-based monthly active business users or being controlled by an entity with certain net annual sales or market capitalization and being "a critical trading partner" for the supply of the service or product provided on the platform or directly related to that platform. See Platform Competition and Opportunity Act of 2021, H.R. 3826 117th Cong. (2021) § 3 and 4.
[112] Platform Competition and Opportunity Act of 2021, (fn 111) § 2.
[113] See FTC press release, *FTC Sues Facebook for Illegal Monopolization* (9 December 2020). On 28 June 2021, the US District Court for the District of Columbia dismissed the FTC's complaint without prejudice and permitted it to file an amended complaint: see C. Kang, 'Judge Throws Out 2 Antitrust Cases Against Facebook', *The New York Times* (29 June 2021).

feature of the recent regulatory attempts. The State Administration for Market Regulation of China (SAMR) has published guidelines, which enables the authority to investigate the acquisitions of digital platforms regardless of the transaction value if the transaction may have the effect of eliminating or restricting competition.[114] The Japan Fair Trade Commission (**JFTC**), on the other hand, is already entrusted with such a power, which enables it to review the acquisitions of start-ups;[115] recent amendments made to the JFTC's Policies Concerning Procedures of Review of Business Combination Paper, elaborate that the JFTC has the authority to review a merger that is not required to be notified, if it considers that the merger is expected to affect domestic consumers.[116] Along the lines proposed in the EU, the report published by the Competition Commission of South Africa states that the Commission intends (i) to oblige specified 'dominant tech companies' to notify all of their transactions and (ii) to take into account the value of data and other intangible assets when deciding whether the current thresholds based on the asset value are met.[117] Likewise, in France, a proposed law will impose an obligation on 'systemic companies' to report all of their acquisitions to the French competition authority.[118] A threshold based on transaction value has been introduced in each of Austria[119] and Germany,[120] and a similar transaction-value based threshold has been recommended by the Competition Commission of India.[121] The more recent draft bill to amend the German Act Against Restraints of Competition will also authorize the

[114] SAMR, Guidelines for Anti-monopoly in the Field of Platform Economy (7 February 2021) cited in W. Huang, W. Zhou, X. Ruan and X. Zhang, 'Antitrust Guidelines for the Platform Economy in the Era of Enhanced Antitrust Scrutiny', *Competition Policy International* (29 March 2021), available at: https://www.competitionpolicyinternational.com/antitrust-guidelines-for-the-platform-economy-in-the-era-of-enhanced-antitrust-scrutiny/ [accessed 5 August 2021].

[115] JFTC, Revised 'Policies Concerning Procedures of Review of Business Combination' (Tentative English translation) (17 December 2019), art 6, note 7, available at: https://www.jftc.go.jp/en/pressreleases/yearly-2019/December/1912174Policy.pdf [accessed 5 August 2021].

[116] JTFC (fn 115), art. 6, notes 2 and 7.

[117] South African Competition Commission, Competition in The Digital Economy (7 September 2020), pp.28-29, available at: https://www.ellipsis.co.za/wp-content/uploads/2020/09/Competition-in-the-Digital-Economy-Report-7-September-2020.pdf [accessed 22 June 2021].

[118] Proposition de loi visant à garantir le libre choix du consommateur dans le cyberspace (20 February 2020), ch. 3, art.7, available at: http://www.assemblee-nationale.fr/dyn/15/textes/l15b2701_proposition-loi [accessed 22 June 2021].

[119] Austrian Federal Cartel Act (KartG) as amended by Federal Law Gazette (Bundesgesetzblatt, BGBl.) I No 56/2017, § 9 para 4.

[120] The 9th Amendment of the German Act Against Restraints of Competition (GWB)(9 June 2017).

[121] Indian Ministry of Corporate Affairs, 'Competition Law Review Committee Report' 133 (July 2019), available at: http://www.mca.gov.in/Ministry/pdf/ReportCLRC_14082019.pdf [accessed 22 June 2021].

Bundeskartellamt to pass an administrative act for companies with certain turnover requiring them to notify all their future transactions.[122] In its Digital Inquiry Report, the Australian Competition and Consumer Commission (ACCC) also seeks the power to make certain firms subject to mandatory notification, since notifications are voluntary under the existing regime.[123]

As to the substantive assessment of mergers, the new amendments made in Germany and Japan, clarify that data-related parameters, such as network effects and access to data, which have a particular impact on competition in digital markets, must be considered in the determination of market power and competitive analysis.[124] The Report of Study Group on Data and Competition Policy published by the JFTC states that merger remedies may be imposed, requiring the parties not to make any changes in their privacy policies.[125] The most far-reaching proposal has been made by the ACCC. Similar to the Stigler Report and US Majority Staff Report, the ACCC's Digital Inquiry Report recommends that it '*may be worthwhile to consider whether a rebuttable presumption should also apply, in some form, to merger cases in Australia. Absent clear and convincing evidence put by the merger parties, the starting point for the court is that the acquisition will substantially lessen competition.*'[126]

Other attempts to scrutinize digital mergers include the call made by Administrative Council for Economic Defense of Brazil, requesting some technology companies to provide information about their transactions made in the last 10 years.[127] Furthermore, in March 2020,

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[122] 10th Amendment to the German Act Against Restraints of Competition (ARC-Digitization-Act), which entered into force on 19 January 2021.
[123] Australian Competition and Consumer Commission, 'Digital Platforms Inquiry Report' (26 July 2019), available at: https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report [accessed 22 June 2021].
[124] The 9th Amendment of the German Competition Act (fn 120) Ch 2, § 18, 3(a); for Japan, see Amendments of the 'Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination' (18 December 2019), English translation available at: https://www.jftc.go.jp/en/pressreleases/yearly-2019/December/1912173GL.pdf [accessed 5 August 2021]; for a similar explanations from the South African Competition Commission and ACCC see, respectively,
SACC, 'Competition In The Digital Economy' (fn 117) and ACCC 'Digital Platforms Inquiry Report' (fn 123).
[125] Japan Fair Trade Commission, 'Report of Study Group on Data and Competition Policy' (6 June 2017), p.61, available at: https://www.jftc.go.jp/en/pressreleases/yearly-2017/June/170606_files/170606-4.pdf [accessed 22 June 2021].
[126] ACCC, (fn 123), p.130.
[127] Administrative Proceeding 08700.002785/2020-21 cited in OECD, The Concept of Potential Competition – Note by Brazil (2021), p.7, available at: https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2021)22&docLanguage=En [accessed 5 August 2021].

the Competition Tribunal of South Africa prohibited the merger between MIH and WeBuyCars transaction, with the reasoning that the complementary nature of the activities of the target may have entrenched the market position of WeBuyCars, and MIH (the target) had the potential to enter the market in which WeBuyCars holds a dominant position.[128]

Thus, not only major jurisdictions, but also emerging countries, have taken steps to regulate digital mergers. While amending the jurisdictional thresholds is more common, the approach to changes in the assessment of mergers varies.

3. Comparative analysis of the recent regulations and reports

Although in almost all jurisdictions, steps are being taken to develop monitoring procedures and hence to regulate mergers involving digital firms with strong market positions, the definition and identification of these firms vary considerably and all of them can be deemed controversial to some extent.

The DMA Proposal will impose obligations on firms designated as 'gatekeepers'. It states that if they exceed certain quantitative thresholds (e.g. the number of users and the continuity of user activity), a rebuttable presumption that the firm should be regarded as a gatekeeper will apply.[129] Such a designation is problematic for two reasons. First, it is difficult to understand how firms may rebut this presumption, because the DMA Proposal deprives them from the opportunity to disprove it based on economic grounds (i.e. efficiency defences).[130] Second, the DMA Proposal does not take into account different business models of the platforms which affects how the platforms' alleged power materializes in practice.[131] When recommending imposing rules on digital mergers, the Stigler Report uses the term 'dominant firms' without defining it.[132] In its introduction, the authors explain about the kind of firms that the Report deals with as dominant platforms and state that it is difficult to define

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[128] *MIJ eCommerce Holdings Pty Ltd ys/ OLX South Africa and WeBuyCars Pty Ltd* (26 March 2020); see Competition Tribunal of South Africa press release, *Tribunal Prohibits Naspers' Planned Merger With WeBuyCars*' (27 March 2020).
[129] DMA Proposal (fn 20), para. 23.
[130] DMA Proposal (fn 20), para. 23.
[131] For a more detailed explanation, see Caffarra and Scott Morton (fn 23).
[132] Stigler Report (fn 80), p.98.

them consistently.[133] Nevertheless, it does not even provide any methodology to regard a firm as a 'platform.'[134] The CMA's Advice, on the other hand, uses the term 'strategic market status' and recommends an 'evidence-based economic assessment as to whether a firm has a substantial entrenched market power in at least one digital activity, providing the firm with a strategic position (meaning, the effects of its market power are likely to be particularly widespread and/or significant).'[135] Hence, it does not set out quantitative criteria from the outset and makes the rules applicable to specific business models.[136] Nevertheless, limiting the application of this widely-configured threshold to defined sectors is controversial.[137] In addition, even under the proposals which enable a case-by-case analysis, it is not an easy task to identify the firms with certain market power and to revisit and correct this identification if the firm loses this power.[138] Indeed, the draft Platform Competition and Opportunity Act provides that once an undertaking is designated with the status of a "covered platform" and thus held under the burden of proving that certain conditions are met to be able to conduct acquisitions, the status will apply for 10 years from its designation even if there is a change in control or ownership structure of the relevant platform.[139]

Although the relevant criteria for designating digital firms that are to be regulated vary among jurisdictions, it seems that all jurisdictions reach the same conclusion that digital firms with certain market power should be required to notify all of their transactions to the relevant competition authorities . However, the recommendations differ on whether such reporting should constitute a mandatory notification, where the firms are prohibited from closing the transaction before obtaining an approval. While the Stigler Report and the DMA Proposal

[133] Stigler Report (fn 80), pp.6-7.
[134] J. Ezrielev, 'Shifting the Burden in Acquisitions of Nascent and Potential Competitors: Not so Simple', *Competition Policy International* (4 November 2020), available at: https://www.competitionpolicyinternational.com/shifting-the-burden-in-acquisitions-of-nascent-and-potential-competitors-not-so-simple [accessed 22 June 2021].
[135] CMA's Advice (fn 62) para 12.
[136] Caffarra and Scott Morton (fn 23).
[137]OECD, Start-ups, Killer Acquisitions and Merger Control (2020), p.46, available at: https://www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control-2020.pdf [accessed 5 August 2021].
[138] OECD (fn 138), p.46.
[139] Platform Competition and Opportunity Act of 2021 (fn 111) § 4.

recommend mandatory notification pre-closing,[140] the CMA's Advice provides that while all mergers should be reported, only those meeting a clear-cut threshold (which may be determined based on the deal value) should not be closed before approval.[141] However, it should be noted that, in the EU, unlike the DMA Proposal, the Crémer Report argues that it is better to observe developments and not to amend the thresholds at this stage, given that transactions may be reviewed based on the referrals made by Member States including those which have already changed their jurisdictional tests.[142] Also, in the UK, the Furman Report, which is the document that the CMA's Advice was built on,[143] merely proposes to oblige those firms with 'strategic market status' to *report* all of their transactions without preventing firms from closing their transactions without obtaining an approval.[144] Although lowering the thresholds may increase transaction costs and overburden the authorities,[145] analysing more mergers may provide a better understanding of the actual effects of these transactions on competition, provided that the tests to be applied in the assessment are suitable for this purpose. [146]

Substantive assessment tests adopted or recommended in the proposals also vary considerably among jurisdictions. At one end of the spectrum, the Stigler Report, the US Majority Staff Report, the ACCC Digital Inquiry Report and the recent US bills introduced by either the Senate or the House of Representatives all recommend establishing a presumption that transactions carried out by 'dominant' platforms are anti-competitive.[147] The reports or the draft US bills, however, do not provide any well-established economic theory or experimental data that would support such a presumption. Furthermore, the US Majority Staff Report states

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[140] Stigler Report (fn 80), pp.33,111 and114; DMA Proposal (fn 20), art. 12.
[141] CMA's Advice (fn 62), pp.59-60.
[142] Crémer Report (fn 4), pp.113-115.
[143] CMA's Advice (fn 62), p.2.
[144] Furman Report (fn 4), pp.94, 95 and 120.
[145] Crémer Report (fn), p.114.
[146] Bourreau and de Streel (fn 12) (stating that there are fewer cases analysed by authorities so far).
[147] Stigler Report (fn 80), p.93; US Majority Staff Report (fn 83),, p.393; ACCC (fn 123), p.109; Competition and Antitrust Law Enforcement Reform Act (fn 106) § 4; The Trust-Busting for the Twenty-First Century Act (fn 84) § 3; Tougher Enforcement Against Monopolies Act (fn 108) § 7(c); Platform Competition and Opportunity Act (fn 111) § 2.

that even if the merging parties can prove the efficiencies that would arise from the transaction, the transaction would be deemed anti-competitive unless proven otherwise.[148] It further adds that the presumption may be rebutted by showing that the transaction is necessary to serve the public interest and that similar benefits could not be achieved through internal growth and expansion.[149] Therefore, it does not allow merging parties to prove their case based on economic considerations but provides non-economic grounds that may be used to refute the presumption. Finally, it advises that authorities should be able to prohibit mergers on the basis that the relevant transaction would be harmful to potential or nascent competition even if it could not prove that the acquired firm would successfully enter the market in a 'but-for' scenario.[150] Likewise, pursuant to the draft Platform Competition and Opportunity Act of 2021, if as a result of a transaction between firms that "compete, would compete, or would attempt to compete against each other, absent the transaction undertakings", the combined entity's market share would exceed 66%, then the transaction may only be allowed if it is "necessary to prevent serious harm to the national economy".[151]

In the EU, while the DMA Proposal is silent about the applicable test, the Crémer Report argues for analyzing as horizontal mergers those conglomerate mergers where the transaction parties are active in adjacent markets, with a view that the adjacent markets constitute an ecosystem in which the merging parties may be actual or potential competitors.[152] It states that if the authority decides that the transaction parties are actual or potential competitors and the market power of the acquirer would increase after the transaction, the transaction parties must prove that merger-specific efficiencies outweigh the anti-competitive effects of the transaction.[153] Thus, the Crémer Report does not provide a presumption that the merging parties can rebut by raising an efficiency claim, but makes it

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[148] US Majority Staff Report (fn 83), p.393.
[149] US Majority Staff Report (fn 83), p.388.
[150] US Majority Staff Report (fn 83), p.394.
[151] Tougher Enforcement Against Monopolies Act (fn 108) § 7(c)(3)
[152] Crémer Report (fn 4), pp.116-117.
[153] Crémer Report (fn 4), pp.117 and 124.

easier for the authority to reverse the burden of proof by enabling it to blur the lines of market definition.

The Furman Report, at first sight, seems to be the most cautious against such an increasing tendency to prohibit digital mergers, as it states that '*a presumption against all acquisitions by large digital companies is not a proportionate response to the challenges posed by the digital econom*y.'[154] Nevertheless, it proposes to change the standard of proof for applying the existing substantive test, which allows a merger to be prohibited only if the competitive harm is more likely than not (the 'balance of probabilities' approach), by making it possible to prohibit a merger even if there is a very low chance that the acquired firm would turn into a competitor (the 'balance of harms' approach).[155] The CMA's Advice, which drew upon the Furman Report, recommends the same change in the existing standard of proof and states that, in principle, it should conduct an in-depth Phase-II investigation to analyze transactions involving firms with strategic market status.[156]

In fact, the proposal to change the existing standard of proof may entail risks which are similar to those that come with the use of presumptions. The irony, as the RBB Report criticizing the Furman Report points out, is that the Furman Report proposes to take this approach when assessing digital mergers, but given their dynamic nature, digital markets are among those markets for which it is perhaps the most complicated to apply this test.[157] The balance of probabilities test, although it requires detecting the probabilities of outcomes, allows the setting aside of the low-probability outcomes, which is the exact thing that is aimed to be identified in the balance of harms approach, along with the size of their impact.[158] On the other hand, a good application of the balance of harms test requires identifying (i) all future outcomes, (ii) the likelihood of these outcomes and (iii) the size of the impact of these

[154] Furman Report (fn 4), p.101.
[155] Furman Report (fn 4), pp 97-101.
[156] CMA's Advice (fn 62), pp.62-63 and fn 63.
[157] RBB Economics, *A question of balance: Comments on a proposed new test for UK merger control* (1 April 2019), pp.2-3, available at: https://www.rbbecon.com/downloads/2019/05/RBB_B59_Brief1.pdf [accessed 5 August 2021].
[158] RBB Economics (fn 157), pp. 2-3.

outcomes on competition.[159] The risk is that, given the uncertainty surrounding these issues, this approach may result in mergers being prohibiting on the basis of very speculative theories and a low probability of anti-competitive effects, without providing supporting evidence.[160] In that case, the lower burden of proof would be as risky as presumptions are. Also, as the RBB Report puts forward, in order to have a truly balanced approach, authorities should consider the potential efficiencies and possible events that may mitigate negative outcomes on competition (e.g. the expansion of third-party competitors and potential market entry) even if they are not likely to occur (i.e. low-probability harms).[161] However, when explaining the standard of proof, the Furman Report does not mention this balancing exercise and focuses only on the low probability harms. Such an approach would possibly lead to outcomes similar to those from applying presumptions.

It may be argued that, imposing the burden of proof on authorities may lead to false negatives, given that the market is dynamic and any theory of harm would necessarily be speculative. However, even if there is under-enforcement in the existing regimes, it is important to further discuss whether it may be better to err on the side of allowing an anti-competitive merger, given that, otherwise, there is a strong possibility of stifling innovation and losing economic efficiency. First, the reason behind imposing presumptions in legal procedures should be analyzed. As a general rule, it is necessary to consider the individual characteristics surrounding each case to reach a fair conclusion. Nevertheless, rebuttable presumptions are used to decrease transaction and adjudication costs as they are based on an abundance of experience obtained from similar legal cases and/or sound economic theories.[162] However, it is fair to say that few digital mergers have been analyzed by authorities, and the

[159] RBB Economics (fn 15757), pp.2-3.
[160] RBB Economics (fn 157), p.3.
[161] RBB Economics (fn 157), p. 3.
[162] Bourreau and de Streel (fn 12).

actual number of assessments made after the transactions have been put into effect is even fewer.[163]

There are two main studies that those arguing for a change refer to:[164] the paper by Cunningham et al. on killer acquisitions[165] and Kwoka's book, *Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy*, published in 2014 which claims that antitrust authorities have only acted in 38% of mergers that cause price increases.[166] However, there are at least two problems with considering these studies as if they provide empirical evidence for the adoption of a presumption against digital mergers. First, they do not consider the impact of these acquisitions on total welfare and second, they do not include any findings specifically about digital mergers. Cunningham et al.'s paper is solely about the pharmaceutical sector and argues that there is evidence that killer acquisitions exist in the pharmaceutical sector, whilst acknowledging that they do not know the effect of these acquisitions on total welfare.[167] Indeed, their model does not measure how much the motivation of the investors in innovative start-ups to exit through acquisition would decrease in the absence of such transactions.[168] Moreover, the pharmaceutical and digital sectors significantly differ from each other. Whilst the process of developing a drug is clearly defined, it is often not foreseeable how a digital product or service would develop, innovations may quickly become out-of-date and most technological products are not necessarily subject to a testing process before their launch.[169] In order for a firm to create a pre-emption strategy, it should be able to understand the possible development of the product. Nevertheless, in digital markets, it is often unknown where and how a rival would emerge.[170] In addition, whereas the

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[163] Bourreau and de Streel (fn 12).
[164] J. Tirole, Keynote Speech to the European Commission's 'Shaping competition policy in the era of digitisation' conference, Brussels (17 January 2019), available at: https://ec.europa.eu/competition/scp19/ [accessed 5 August 2021]; see also Holmström et al (fn 3), p.3.
[165] Cunningham et al. (fn 79).
[166] J. Kwoka, *Mergers, Merger Control, and Remedies*: *A Retrospective Analysis of U.S. Policy* (MIT Press 2014), p.155.
[167] Cunningham et al (fn 79).
[168] Holmström et al (fn 3), p.9.
[169] Holmström et al (fn 3), pp.9-10.
[170] L. Cabral, *Merger Policy in Digital Industries* (May 2020) CEPR Discussion Paper No. DP14785, p.4, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3612854 [accessed 5 August 2021].

products of the transaction parties were close substitutes in the acquisitions analyzed by Cunningham et al.,the products that digital mergers involve are mostly complementary (see e.g. *Google/Android*[171] and *Apple/Shazam*[172]).[173] Furthermore, unlike in the pharmaceutical industry, because IP rights and licensing requirements are not well-defined in digital industries, acquisitions become a way to legally transfer technologies to utilize and complement with the acquirer's assets.[174]

In addition to the lack of evidence, even the attempts to establish economic theories about the effects of these mergers are new and not sound enough to justify the introduction of a presumption.[175] The features of digital markets that are argued to be the reason for departing from the existing law are not unique to digital markets, neither they are unfamiliar concepts for competition lawyers. Colomo emphasizes that the problems identified in digital markets, such as leveraging, network effects, lock-in effects and multi-sided markets, are not specific to digital markets, and EU competition law has established economic-based principles to deal with these problems.[176] There is no robust evidence showing that the established framework is not helpful in remedying the problems in digital markets. Hence, there is no reason justifying the departure from them.[177]

Moreover, there are more compelling theories arguing the opposite view. First, disregarding efficiency considerations may be particularly risky in these markets because, the potential synergy and complementarity between the inputs and outputs of the transaction parties that may arise as a result of the merger is of utmost importance.[178] If a pro-competitive transaction that would lead to (i) the creation of a new pro

[171] Case AT.40099 *Google/Android* (18 July 2018).
[172] *Apple/Shazam* (fn 9), para 123.
[173] Holmström et al (fn 3), p/9.
[174] Cabral (fn 170), pp.5, 6 and 8.
[175] Bourreau and de Streel (fn12).
[176] P. Ibáñez Colomo, *A Contribution to 'Shaping Competition Policy in the Era of Digitisation* (30 September 2018) 2-3, available at: https://ssrn.com/abstract=3257998 [accessed 22 June 2021].
[177] Ibáñez Colomo (fn 176), pp. 2-3.
[178] Bourreau and de Streel (fn 12).

uct or service with the complementary function of the acquirers' assets, (ii) a reduction in costs and (iii) an increase in network effects, and thus, outweigh any price or non-price anti-competitive effects is prohibited, economic efficiency will be lost.[179] Indeed, in arguing the Furman Report for a shift to a new approach in the assessment of digital mergers, itself states that most acquisitions of digital firms are pro-competitive and create efficiencies.[180]

A recent experimental study analyses digital mergers ex post and its outcomes support this view. Accordingly, the Lear Report finds that the *Facebook/Instagram* merger resulted in consumer benefits that would not have been created in the absence of the merger and that outweigh any anti-competitive impact. It also shows that the growth of Instagram may, to a great extent, be attributed to the merger.[181]

The second reason why presumptions are undesirable is that imposing them will have a systemic effect on the market. Fewer acquisitions (regardless of how pro-competitive they are) will be made, hence the motivation for entry-for-buy-out will significantly decrease.[182] However, in digital industries, the fruit of the investment is being acquired by an incumbent, rather than, for example, the protection of IP rights.[183] This will run contrary to the alleged benefits of the presumptions as the innovation by nascent firms will be completely lost. It is important to appreciate that it is a very low probability that a start-up would indeed strongly challenge the incumbent. It might be risky to create a systemic obstacle to founding a start-up to protect these very rare challengers.[184] As Holmström et al. state '*we want the economy to "pursue" all start-ups, so that the rare true challenger has a chance to challenge the incumbent.*'[185] Some argue that there may be other firms that may acquire the start-up, so their

[179] Holmström et al (fn 3), pp.18-19.
[180] RBB Economics (fn 153), p.3.
[181] Lear, *Ex-post Assessment of Merger Control Decisions in Digital Markets* (9 May 2019), p.71, available at: https://www.learlab.com/wp-content/uploads/2019/06/CMA_past_digital_mergers_GOV.UK_version-1.pdf [accessed 22 June 2021].
[182] Bourreau and de Streel (fn 12).
[183] Gans, Hsu and Stern (fn 5), pp.571-86.
[184] Holmström et al (fn 3), p.19.
[185] Holmström et al (fn 3), p.19.

incentives would not necessarily change.[186] However this view is not compelling, because the transaction price would considerably be affected by the monetary power of the acquiring firm.

Thus, it seems that innovation considerations are undermined in the proposals to alter the substantive assessment tests. The weight given to concentration, as opposed to innovation, signals the re-emergence of an abandoned paradigm of competition law. FTC Commissioner Phillips[187] argues that the argument for imposing presumptions has the underlying view of 'big is bad' which led to the holding in *United States vs. Philadelphia National Bank*[188] and the 1968 Merger Guidelines.[189] He argues that this 'nostalgia' overlooks the reasons that caused a consensus on leaving this paradigm.[190] These reasons, among others, were that pro-competitive mergers are prohibited,[191] and it was disregarded that it may often be the case that it is healthy competition and efficiency that leads to greater size and increased concentration.[192] Consequently, American consumers had suffered.[193] Hence, a preference of allowing anti-competitive mergers over prohibiting pro-competitive ones was a clear change in policy choice stemming from these considerations, and even for those who do not accept the positive economic consequences of such a paradigm shift, it was promoted to enable parties to enjoy their freedom to contract unless there is proven harm.[194]

Therefore, the theoretical account on presumptions may undermine the risk of chilling innovation, without any concrete evidence that would justify undermining that risk. Hence, it needs to be tested from an economic perspective.

4. Conclusion

The growing importance of the digital economy imposes significant challenges for competition policy enforcement. There are debates and discussions on how competition

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[186] M. Motta and M. Peitz, *Big Tech Mergers* (January 2020) CEPR Discussion Paper DP14353, pp.14-35, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3526079 [accessed 5 August 2021].
[187] Phillips (fn 86), pp.4-5.
[188] *United States v. Philadelphia National Bank* (fn 87).
[189] US Department of Justice, *Horizontal Merger Guidelines* [1968], available at: https://www.justice.gov/archives/atr/1968-merger-guidelines [accessed 5 August 2021].
[190] Phillips (fn 86), p.5
[191] G. Stigler, *The Economist As Preacher and Other Essays* (University of Chicago Press, 1982), p.41.
[192] Phillips (fn 86), pp.5-6.
[193] Phillips (fn 86), p.6.
[194] OECD (fn 138), p.41.

authorities will prevent high levels of market concentration without unnecessarily limiting competition and calibrate a balance between efficiency and concentration. In finding an answer to that, regulators should be on the lookout for the unintended and undesirable consequences of inappropriate interventions and justify any attempt to depart from the existing law. Accordingly, this article concludes that the argument for lowering the threshold for prohibiting digital mergers (i) involves the risk of chilling innovation and losing significant efficiencies and (ii) does not rely on concrete evidence and sound economic theories. In times of great populism, it should be recalled that antitrust law is not a panacea,[195] and it should not become Orwellian by prohibiting every move of digital firms for the sake of vague reasons and objectives.[196]

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[195] Phillips (fn 86), p.3.
[196] A. Ezrachi and M. Stucke, *The fight over antitrust's soul* (2018) 9(1) JECLAP 1, p.2.